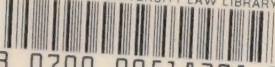


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To Be a Victim

Encounters with
Crime and Injustice

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To Be a Victim

Encounters with Crime and Injustice

Edited by

Diane Sank, Ph.D.

*City University of New York
New York, New York*

and

David I. Caplan, Ph.D., L.L.B.

*Attorney, Patent Law
Madison, New Jersey*

With the assistance of
Brian Sank Firschein, M.A.



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This volume is dedicated to the memory of Prof. Max Hamburg,
who spoke gently and worked diligently against crime and injustice,
and in support of all suffering victims.

Contributors

BERTRAM BANDMAN, Ph.D., Professor, Department of Philosophy, Long Island University, Brooklyn Campus, Brooklyn, New York 11201.

ELSIE L. BANDMAN, Ed.D., R.N., F.A.A.N., Professor, Hunter-Bellevue School of Nursing, Hunter College, City University of New York, New York, New York 10010.

JAMES E. BAYLEY, Ph.D., Associate Professor, Department of Philosophy, The City College, City University of New York, New York, New York 10031.

DAVID I. CAPLAN, Ph.D., L.L.B., Attorney at Law, Madison, New Jersey 07940-1453.

JOHN T. CHU, Ph.D., Professor, Operations Research/Management Science, Polytechnic University, Brooklyn, New York 11201.

RODOLPHE J. A. DE SEIFE, J.D., Professor of Law, Northern Illinois University College of Law, DeKalb, Illinois 60115.

GILBERT S. FELL, Ph.D., Professor, Philosophy Department, Monmouth College, West Long Branch, New Jersey 07764.

BRIAN SANK FIRSCHEIN, M.A., Englewood Cliffs, New Jersey 07632.

MARIE-LOUISE FRIQUEGNON, Ph.D., Associate Professor, Department of Philosophy, William Paterson College of New Jersey Wayne, New Jersey 07470.

JOSEPH G. GRASSI, Ph.D., Professor, Department of Philosophy, Fairfield University, Fairfield, Connecticut 06430.

STEPHEN P. HALBROOK, Ph.D., J.D., Attorney at Law, Fairfax, Virginia 22030.

MAX HAMBURGER, Ph.D., Formerly Professor Emeritus, Department of Biology, The City College, City University of New York, New York, New York 10031 (deceased 1989).

ALBERT G. HIRS, Ph.D., Professor Emeritus, Department of Sociology, SUNY Brockport, New York 14420. Formerly Representative at U.N. Headquarters of the International Society for Criminology and International Association of Penal Law, New York, New York 10021.

DOUGLAS N. HIRSH, Ph.D., J.D., Professor/Chairman, Department of Philosophy, Rutgers University, New Brunswick, New Jersey 08903.

MICHAEL KACI, Ph.D., Professor of Theoretical Physics, Department of Physics, The City College, City University of New York, New York, New York 10031.

ARTHUR KATZMAN, Ph.D., Associate Professor, Department of Sociology, John Jay College of Criminal Justice, City University of New York, New York, New York 10019.

BILL LAWSON, Ph.D., Assistant Professor, Department of Philosophy, University of Delaware, Newark, Delaware 19716.

SANDER LEE, Ph.D., Associate Professor, Department of Philosophy, Keene State College, Keene, New Hampshire 03431.

BURTON M. LEISER, Ph.D., E. J. Mortola Distinguished Professor of Philosophy, Pace University, New York, New York 10038.

TIBOR R. MACHAN, Ph.D., Professor, Department of Philosophy, Auburn University, Auburn, Alabama 36849.

SUSAN R. PETERSON, M.A., Adjunct Associate Professor, Department of Philosophy, Adelphi University, Garden City, New York 11530.

DIANE SANK, Ph.D., Professor, Department of Anthropology, The City College, City University of New York, New York, New York 10031.

MARY ELLEN WAITHE, Ph.D., Director, Bioethics Program, and Associate Professor of Philosophy, Cleveland State University, Cleveland, OH 44115.

ROGER WERTHEIMER, Ph.D., Associate Professor, Department of Philosophy, California State University, Long Beach, California 90840

WILLAVENE WOLF, Ph.D., Professor, Department of Applied Psychology, New York University, New York, New York 10003.

MARLENE A. YOUNG, Ph.D., J.D., Executive Director, National Organization for Victim Assistance (NOVA), Washington, DC 20010.

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We also wish to thank the Plenum Publishing Corporation, the staff of Insight Books, and most especially Norma Fox, Executive Editor of Insight Books, for the time, patience, and valued suggestions extended to us during the preparation of this manuscript. We are particularly grateful and appreciative to Ms. Fox for

her enthusiastic support and encouragement throughout this time.

Both editors were associated with a conference at Pace University in 1981 on victims of crime. One editor (Diane Sank) cochaired the conference with the late Dr. Max Hamburg, who is a contributor to this volume. The other editor (David I. Caplan) was a participant and speaker at that conference, as were some other contributors to the present volume. All have rethought, revised, updated, and rewritten their original ideas and words and have been joined by the other contributors to this book.

The end product of these varied elements and efforts is our present, greatly expanded, contemporary contribution to the field of victimology.

We wish to thank Patricia Murphy, Esquire and Dr. Mary Burres for their encouragement, advice, and constant support throughout the preparation of this work.

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We cannot forget or neglect to acknowledge the multitudes of victims themselves, past and present, a few included in this book, but most unknown, unnamed, and represented only by very shocking, shameful, impersonal statistics. We hope this book will aid in the quest to reach the enviable goal that the lessons gained from their experiences, and their mental and physical suffering, will direct us to the road leading to a lessening of the numbers and agencies of all future victims of crime and injustice.

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To Be a Victim

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Crime and Injustice

Introduction and Overview

It is a terrible, an inexorable, law that one cannot deny the humanity of another without diminishing one's own: in the face of one's victim, one sees oneself.

JAMES BALDWIN (1924–1988)

Justice consists in doing no injury to men; decency in giving them no offense.

CICERO (104–43 B.C.)

Crimine ab uno disce omnis. (From a single crime, know the nation.)

VIRGIL (70–19 B.C.)

Why the Concern for Victims?

DIANE SANK, PH.D., AND BRIAN SANK FIRSCHEIN, M.A.

Victims? Why our concern for Victims¹ of Crime and Injustice?
Rather ask: Why not?

"U.S. Leads the World in Violent Crime" proclaimed a 1991 newspaper headline (*The Record*). A 1991 Senate Judiciary Committee report stated that the United States is "the most violent and self-destructive nation on Earth." In contrast to 1960, when "Fewer than 35 Americans became the victims of violent criminals every hour," in 1990 "about 200 Americans [were] victimized every hour" (*The Record*).

There were more than 34 million crimes and more than 34 million Victims of assaults, robberies, burglaries, rapes, knifings, shootings, poisonings, and drunk-driving incidents in 1990 in the United States (as vividly portrayed by Marlene A. Young in Chapter 2, "Survivors of Crime"). Joseph G. Grassi notes in Chapter 22 that one of every four households was affected by violent crimes in 1990. Furthermore, each day, each hour, each minute, at least one

¹The word *victim* is spelled with a capital V throughout this chapter. This style has been chosen for the purpose of making a "statement" identifying the *Victim* as a distinct person or a member of a group who deserves to be acknowledged and respected. We hope that this recognition will help improve the status of the *Victim* as a real, credible individual, and will contribute to a change in society's attitude toward the *Victim*, from that of benign neglect or even ill will to that of respect, support, and admiration.

close relative or friend of a Victim suffers grief, emotional trauma, and stress as a result of the relations or friend's victimization.

Why our concern for Victims? Despite the high numbers of new Victims each year, they are still essentially neglected, and too often treated as "nonpersons" who should not be seen or heard, as John I. Chu observes in Chapter 8, "A Systems Science Approach to Crime, Criminal Justice and Victim Justice." According to Chu, society seems to wish that the Victim would just fade away, so as not to bother the police, the courts, the legislatures, and the public. In fact, as Young deplores, too many Victims "face a system that has refused to acknowledge that they even exist." Sweeping Victims out of sight will not remove the problem, nor will it reduce the numbers or decrease the sufferings of the Victims, their families, and their friends. Only by openly discussing their plight and their suffering can we begin to address this prevalent, urgent problem, one that touches more of us every day. It is a problem that will not go away by itself and is a potential threat to every one of us, every day, everywhere.

To Be a Victim: Encounters with Crime and Injustice examines the issues by depicting the multidimensional aspects of crime and injustice, and by focusing on Victims as the main, yet most neglected, figures in this portrait. This book offers suggestions for alleviating or eliminating their victimization. Professionals from varied disciplines—law, philosophy, sociology, mathematics, statistics, education, political science, biology, nursing, victimology, physics, business, psychology, management, and anthropology—present their perspectives. What follows in this chapter is a sampling overview culled from the varied ideas, theories, and viewpoints of our twenty-six contributors, together with some of our observations and thoughts.

Tibor R. Machan, for example, in Chapter 7, "Rescuing Victims—from Social Theory," decries the fact that the role of the Victim is often discounted in current concepts of "social theory." Because of their lack of "genuine original control over their own behavior," they are relegated to the "category of casualties." Machan offers a solution to reverse this trend, making Victims into "champions" while "righting the wrong of victimization." Rodolphe

J. A. de Seife, in Chapter 5, "Victim Compensation: The Joint Responsibility of the Criminal and Society—A Social-Contract Approach," argues that the "traditional American adversarial legal system . . . is fundamentally flawed" as it "isolates the victim from the criminal process," relegating Victims to the status of mere "onlookers."

Victimology is a complex and relatively neglected area of study. While there are different interpretations of who Victims are, the dictionary definitions are fairly consistent. *Random House Webster's College Dictionary* (1991) states that a Victim is "a person who suffers from a destructive or injurious action or agency: war victims," or "a person who is deceived or cheated," or "a living creature sacrificed in religious rites." According to *Webster's New Universal Unabridged Dictionary* (1983), a Victim is "a person or animal killed as a sacrifice to some god in a religious rite," "someone or something killed, destroyed, injured, or otherwise harmed by, or suffering from, some act, condition, agency, or circumstance, as victims of war," or "a person who suffers some loss especially by being swindled, a dupe." *The Concise Oxford Dictionary of Current English* (1990) writes that a Victim is "a person injured or killed as a result of an event or circumstance (a road victim; the victims of war)," or "a person or thing injured or destroyed in the pursuit of an object or in gratification of a passion, etc. (the victim of their ruthless ambition)," or "a prey, a dupe (fell victim to a confidence trick)," or "a living creature sacrificed to a deity or in a religious rite."

Contributors to this book have also sought to define the term. James E. Bayley, in Chapter 4, "The Concept of Victimhood," proposes a narrower definition of Victim, applying the word to those who "suffered a loss" or a "decrease in well-being unfairly or undeservedly" and who were "helpless to prevent the loss." For instance, a person whose house is destroyed in a flood is a Victim, but a burglar who is injured by the homeowner during a burglary is *not*. Moreover, the loss must have "an identifiable cause", thus a person assassinated is a Victim, but a person who dies in his or her sleep is *not*. Finally, according to Bayley's definition, "the legal or moral context of the loss entitles" the Victim "to social concern"

Thus a person hit by a drunk driver and a person "whose home is destroyed by an earthquake in an area that has never had an earthquake" are both Victims, but "homeowners who have knowingly built homes right over a fault which geologists warned them could slip at any time" are *not* Victims. In Chapter 25, however, Roger Wertheimer posits a broader definition that includes Victims of mishaps such as earthquakes.

Despite our different contributors' varying definitions, they all share the belief that a Victim is one who innocently suffers an injury or loss.

We tend to take a broader view of Victims, including in the term anyone who suffers from any occurrence. Those supporting a narrower definition may believe that this definition dilutes the concept of the Victim and will perhaps reduce efforts to help Victims. We think the opposite applies, that is, that the broader the concept of Victims (within the dictionary definition), the more people will identify with them, and also the more our conception will be that Victims are the norm. Of course, thinking of Victims as resembling the norm does not mean that Victims should receive less sympathy or support.

NEGATIVE ATTITUDES TOWARD VICTIMS AND VICTIMIZATION

One might assume that everyone is sympathetic to Victims of crime or injustice. Surprisingly, this does not seem to be true. Many people either view victimization as an aberrant occurrence or, far worse, see Victims as precipitating their own victimization or inviting others to victimize them. This attitude exists both toward crimes against individuals and toward social and political injustices committed by governments.

As evidence that the general public is part of the Victim-blaming syndrome, in 1982 a Florida jury found an accused rapist not guilty, the foreman of the jury suggesting that the female Victim of the rape had encouraged or even invited the rapist to

attack her (i.e., she had advertised her sexual availability) when she chose (as was her legal right) to wear only a skirt and blouse with no undergarments ("She Asked for It," 1989). Remarkably, this same accused and acquitted man was caught in Georgia a month later and was charged with wielding a knife while committing another rape. He was sentenced to fifty years in prison after conviction by a jury that was unaware of the prior case.

American judges have also expressed Victim-blaming views in rape cases, saying that the short length of a woman's dress or the amount of her makeup sends a message to attract males; therefore the woman should accept the inevitable consequences (Margolis, 1991). The fact that women without makeup, wearing long dresses and undergarments, are also raped is strangely overlooked by these judicial sages, as Susan R. Peterson succinctly reveals in Chapter 11, "Victimology and Blaming the Victim: The Case of Rape."

In 1990, another American judge made a similar Victim-blaming "judgment" in court, saying that the defendant had had sufficient provocation because the woman who had been raped was less than an upstanding, respectable person. Remarkably, the rapist, who had just been found guilty, spoke out, disagreeing with the judge's characterization and indicating that the Victim had not precipitated the rape and had not wanted or otherwise "encouraged" him to rape her. It is distressing that it was the perpetrator, not the court or the legal system, who supported the Victim ("Verdict of Shame," 1990).

The portrayal of rape Victims as women of less than the highest moral character became a factor in the "Central Park Jogger" trials, held in New York City in 1990–1991 (Sullivan, 1990). Although the Jogger, a thirty-year-old Wall Street investment banker, had valiantly tried to fight off the group of thirty young male attackers, some of whom beat her unconscious on April 19, 1989, she was pictured in the trial as an unmarried woman who had engaged in sexual activities with others. She suffered a painful near-death experience, losing "three-quarters of her blood" (Turque with Underwood). After more than eighteen months in a slow and uncertain recovery, she faced further stress

and trauma with the exposure of intimate aspects of her personal life (Kantrowitz with Gonzalez, 1990), causing her further victimization. Also, after testifying in court, she was "jeered by spectators as she left the courthouse" (Turque with Underwood, 1990). It is not surprising that many Victims, particularly rape Victims, do not identify themselves or press charges, for fear of further humiliation, trauma, and embarrassment.

A recent and glaring example justifying this fear occurred in April 1991 when some of the news media revealed the name of a woman who claimed she had been raped in Palm Beach, Florida on March 30, 1991 (NBC-TV, 1991; Butterfield and Labor, 1991). Although *Newsweek* magazine found that the majority (77%) of those they had polled opposed publication of a rape victim's name (United Press International, 1991), CBS Radio (1991) reported that some of the media were contemplating revealing the name of the Central Park jogger. She responded by saying that her name was the last shred of privacy that she retained.

Women are warned to "stay off the streets at night" because being out after dark, they are told, sends an "invitation" to muggers or rapists to attack them. Golda Meir, former prime minister of Israel, perceptively noted that there is something inherently and morally wrong in telling women (as well as the elderly and children) to get off the streets, or not to go out at night, to avoid being attacked. Rather, she asked, wouldn't it serve the same purpose, and perhaps be more moral, to keep the criminals off the streets, so that everyone could walk in freedom from fear of attack, at all hours and in all places (Brownmiller, 1975)?

The general public seems not only to accept such views of rape but also to extend those attitudes to other forms of victimization. For example, Victims of more than one burglary or mugging are often viewed either as "not doing enough" to prevent the crime or as "doing something" to invite or encourage further victimization.

The reasons that people have negative or, at best, neutral attitudes toward Victims have challenged observers. Victim-blaming views of professionals in the fields of criminology and

victimology are examined by Andrew Karmen in Chapter 24, "The Controversy over Shared Responsibility: Is Victim Blaming Ever Justified?" He answers his question with an unequivocal no. As we noted, Peterson, in Chapter 11, reveals the adverse effect on rape Victims of being blamed for "inviting" rape.

The view that our society often neither sympathizes with Victims nor supports them or their rights is seen in Joseph Epstein's *New York Times Magazine* article "The Joys of Victimhood" (1989). Epstein stated that "Victims have to find enemies" and think "the drama of life is heightened if you feel that Society is against you." "To feel oneself excluded and set apart is no longer obviously or even necessarily a bad thing," he wrote. His seemingly convoluted and contradictory reasoning appears to be a variant of Victim-blaming attitudes.

Comparable negative attitudes and stigma, traceable back centuries, are manifest as well toward those who differ from the normal because of physical or mental conditions, those with physical disabilities or diseases (people in wheelchairs and the blind, the deaf, the disfigured, and those with leprosy or AIDS); those with disabling mental disorders (schizophrenia or manic-depressive illness); those with genetic or neurological diseases (Huntington's, Alzheimer's, and Parkinson's diseases); and those who are mentally retarded; as well as those who are sexually variant. Society's attempts to dissociate itself from variations from the "norm" are being reversed slowly, and as Roger Wertheimer notes in Chapter 25, the condition of some "variants" (such as ethnic minorities, the elderly, the young, and females) has begun to improve during the past two centuries.

We should realize that *all* of us, at some time in our lives, are potential Victims of some form of crime or injustice. Thus, becoming a Victim may actually make us become part of the "norm." Perhaps with this realization, we will avoid the erroneous view that Victims are aberrant forms of humanity, to be shunned or not to be given fair treatment and consideration by the courts, legislators, and society.

In Chapter 24 Karmen traces victimology's origins to the criminologists who pioneered in this field "in the 1940s and 1950s with the 'antivictim' slant of shared responsibility." But a new "provictim" orientation emerged within victimology in the early 1970s. Karmen believes that in the dichotomy of Victim blaming and Victim defending, the former is never justified, and the latter also is not the solution. Rather he proposes that what is needed is a perspective that blames the system (i.e., "social institutions and environmental conditions").

Negative attitudes toward all Victims do not occur in all societies; however, they are expressed toward many Victims in many societies, and particularly in ours. Witness the disgraceful incidents of child abuse, parent abuse, patient abuse and nurse abuse, sexual abuse, varied forms of incestuous abuse within families, harassment of women seeking an abortion, or the abuse of unwanted children—all in the past have been generally under-reported, ignored, or hidden behind closed doors, where the Victims have ordinarily suffered in silence. An indication of the extent of these abuses is the CBS Radio (1991) report that there were two and a half million cases of child abuse alone in the United States in 1989. These and similar issues are explored with sensitivity and concern by Marie-Louise Friquegnon and Willavene Wolf in Chapter 10, "The Rights of Child Abuse Victims"; perceptively and succinctly by Peterson in Chapter 11 on rape; and with sympathetic personal perspectives by Elsie L. Bandman and Bertram Bandman in Chapter 15, "Patient-Nurse and Nurse-Patient Abuse: The Well-Kept Secret." The varied factors necessary to achieve harmony and "Justice for Health Consumers and Providers" are deftly presented in Chapter 16 by Bertram Bandman and Elsie L. Bandman.

FROM WITCHCRAFT TO MODERN TECHNOLOGY

Witches have fascinated people throughout history and have been blamed for both bad and good events. In Chapter 12, Albert

G. Hess presents the saga of "Victims in Seventeenth-Century Witchcraft Trials," explaining that his use of the term Victim is restricted to persons who "allegedly suffer damage to their body or property by an act of 'black' (i.e., bad) witchery." According to Hess, not only does witchcraft still exist in the Western world but belief in witches has recently increased. He postulates that historical studies may help discover the origin and means of prevention of this unusual form of victimization.

To think that criminals can become Victims within the walls of their jails or prisons may seem incongruous. Yet cases of mistreatment by guards and the potential victimization of criminals through medical research (e.g., "voluntary" inoculations of prisoners with harmful substances, followed by injections of experimental drugs) have been quietly practiced, and they raise controversial ethical and legal questions. Mary Ellen Waithe, in Chapter 13, "Perpetrators of Violent Crime as Potential Victims of Research in Prison," describes another form of potential victimization of accused persons. Defendants who have been "arrested and charged" with serious crimes and who have not yet been found guilty may be incarcerated because of the arraignment judge's suspicion that they were "mentally impaired" (i.e., mentally ill or retarded) when they allegedly committed the crime. These "pre-trial detainees" are psychiatrically evaluated in a facility for the mentally ill for a determination of their competence to stand trial. Waithe describes their participation in a research project studying the causes of their criminal behavior. In exploring the attendant ethical questions, she considers the effects such research might have on the final psychiatric diagnosis, the trial verdicts, the sentences, and the possible victimization of the detainees.

In Chapter 7 on social theory, Machan states that any tenable social theory includes "a philosophical theory of individualism," in which humans have both "moral and legal responsibilities." Thus they can be "perpetrators of wrongful acts" against Victims and, as such, can be held accountable by society and treated accordingly, that is, punished.

Members of industrial and high-technology societies experi-

ence new forms of crimes and consequently new manifestations of victimization. Such Victims suffer from the effects of all sorts of pollution in the workplace, as well as in the air and water. As we develop more complex technologies, there will be new forms of crimes, new criminals, and unhappily, new Victims.

Ramifications of new technology are seen in John T. Chu's Chapter 14, "Computer Crime and Victim Justice." Chu observes that "the birth of the computer brought to the surface" . . . "other serious defects in the traditional ways of legal thinking," and he believes the problem lies in an outdated legal system. Defining crimes as offenses against the state is "a major cause of injustice to victims." Chu does not think there is a need for new congressional legislation. Rather, he believes, Victims of computer crimes can be adequately protected by existing laws, if more emphasis in interpreting laws is given to Victim justice.

PUNISHING PERPETRATORS: HELPING VICTIMS

Chapter 23, "Why Retributivists Should Care about Deterrence," presents the philosophical legal views of Douglas N. Husak, who asks, "Does severe punishment (i.e., the death penalty) actually deter other criminals from committing similar crimes?" Husak concludes that the absence of evidence of deterrence is sufficient to show that the death penalty is cruel and gratuitous, "therefore undeserved, and therefore unjustified."

The mistreatment of Victims of crime by governments has a long history. It originated in the shift of "conflict resolution" from the civil to the criminal courts in nation states, with the Victim relegated to an insignificant role in the criminal courts, according to Roger Wertheimer in Chapter 25, "Preferring Punishment of Criminals over Providing for Victims." He deplores the "systemic," "purposeless" neglect and mistreatment of Victims, as governments show a "preference for punishing violators" rather than providing for Victims' needs.

WEAPONS CONTROL: PRO AND CON

The heated controversy surrounding the issue of weapons control is the focus of Stephen P. Halbrook's eloquent and persuasive defense of the right to keep and use weapons. In Chapter 21, "Victims and Arms in Classical Legal Philosophy," he cites historical evidence, from Socrates in fifth-century B.C. Greece, to Beccaria in eighteenth-century Italy, to support his thesis that the "classical liberal" tradition supported the right of potential Victims of violent crime to have arms for "prevention, resistance," and "self-preservation." Halbrook reveals that Beccaria's views influenced Thomas Jefferson, who supported freemen's use of arms, and by the framers of the U.S. Constitution, who provided, in the Second Amendment, for the "right of the people to keep and bear arms."

In Chapter 18, "Weapons Control Laws: Gateways to Victim Oppression and Genocide," Coeditor David I. Caplan presents cogent and sympathetic historical evidence that the availability of unregistered (and unlicensed) firearms, as well as liberal legal rules allowing their use, serves as an essential deterrent to acts of victimization by criminals as well as by oppressive governments. The Second Amendment, Caplan believes, provides the constitutional rationale for strong opposition to gun control laws. Further, the right to carry and use such weapons enables potential Victims to protect or defend themselves against those who would commit violent crimes or injustices against them.

In contrast, strong support for gun control laws is expressed by Chu in Chapter 8 on "Systems Science" and by Joseph G. Grassi in his impressively affirmative answer to the question posed in the title of Chapter 22, "Is Gun Control Legislation a Solution for Protecting Victims?" Grassi cites nine thousand deaths in 1988 from handguns as support for gun control legislation as the "first and necessary step" to eliminate crime victimization. But, he adds, to truly solve this problem "we must change the social, economic, and political conditions that lead to crime"

and modify the "socioeconomic system that ignores the plight of the vast majority of the people."

Rodolphe J. A. de Seife in Chapter 5, "Victim Compensation: The Joint Responsibility of the Criminal and Society—A Social-Contract Approach," also postulates the need for uniform nationwide control of handguns and assault weapons, seeing "no reason for citizens in a civilized society" to carry or use these weapons if society is indeed "policing" violence. Yet he moderates this view by supporting the keeping or carrying of such weapons for self-defense if they are properly registered and licensed, and if their use for criminal activities results in high penalties. Caplan and Halbrook would not support such a compromise, as it entails licensing and registration (i.e., knowledge and supervision) of weapons by government agencies, which would facilitate arms confiscation.

PERSONAL PERSPECTIVES OF VICTIMS

In Chapter 3, "Thoughts About Victims of Crime and Injustice and the Nature of Justice," the late Max Hamburg deplored the shabby treatment of Victims of crime and injustice. He believed that society's failure to apprehend or prosecute criminals, or the unwillingness to punish them "in a manner that fits the crime," introduces an "asymmetry into our social order that degrades not only the actual victim but also all of us potential victims." Hamburg called for "revenge" against criminals, not in a "Draconian manner" but to attain "symmetry" in justice, balancing the equation for both Victims and victimizers. As a biologist, Hamburg also sought to explain the unfair treatment of Victims from the perspective of the life sciences. He hoped to find "universal rules of justice and behavior" that would help "in the search for an ethical formula or a theory of justice."

In Chapter 2, Marlene A. Young, Director of the National Organization for Victim Assistance (NOVA), paints a personal and sensitive picture of the plight and turmoil of Victims of violent

crimes. The 34 million crimes committed in 1990 are converted by Young into alarming daily statistics: 12,783 people assaulted, 14,354 burglaries, 303 rapes, 66 fatalities due to drunken drivers, and 64 murders. Then, from direct reports in the files of NOVA and other sources, Young transforms her chapter into living, personal vignettes of Victims' sufferings from "three primary injuries": physical, emotional, and financial. She portrays the valiant though painful struggles of these Victims to survive and return to a normal life—an especially difficult task after serious personal injury or the death of a loved one. Young also draws attention to secondary injuries that may be "caused by the very agencies and institutions that should be helping" Victims in America.

Despite the individual experiences of trauma and grief so poignantly presented, Young sees hope and progress in the past two decades of accomplishments:

- A Victims' Bill of Rights, passed in forty-eight of our fifty states.
- Victim compensation programs of financial assistance, in forty-nine states (detailed in Chapter 5 by de Seife).
- State constitutional amendments that protect Victims of crime, passed in seven states.
- National Crime Victims' Rights Week, first proclaimed in 1981 by President Ronald Reagan, and later adopted by forty states.

VICTIMS OF INJUSTICE

Among the worst forms of victimization are those stemming from political, national, religious, or cultural persecution, as conveyed in the single word *genocide* (the intentional extermination of an entire people, culture, race, or nation). Genocide has resulted in the death or enslavement of hundreds, thousands, millions of

innocent Victims. This was the terrible fate of six million Jews during the Holocaust, from 1933 to 1945.

In Chapter 20, "The Law and Morality of War Crimes Trials," Sander Lee details new ways of prosecuting those who have committed national and international crimes against innocent political, religious, social, or cultural groups. War criminals and political criminals would be prosecuted for such crimes at *any time* after they had committed them, even ten, twenty, fifty, or more years later. Lee believes this approach should serve as a strong deterrent to all heads of government, despots, and their faithful subordinates, who would otherwise believe that they could escape prosecution if enough time had elapsed after their crimes.

Burton M. Leiser, in Chapter 17, "Victims of Genocide," sensitively and poignantly details the cruel acts of torture and extermination perpetrated by humans against humans in many countries, today as well as in the past—against religious, cultural, political, and national entities. One example is the recent wanton decimation of the Yanomami Indians of South America by gold prospectors and foresters in Brazil and Venezuela. They have cut down the Yanomami's ancient hereditary rain forests, have introduced diseases to which the Indians have no immunity, have contaminated their waters, and are destroying their culture. This havoc continues despite strong protests to the United Nations and promises from the government of Brazil that it will prosecute the wrongdoers (Brooke, 1989).

About twenty thousand years ago, the indigenous (i.e., original) peoples, ancestors of those Yanomami Indians, first settled in North America. We (incorrectly) call them Eskimos and American Indians, although they consisted of hundreds of independent nations and cultures, including the Inuit, the Blackfeet, the Navaho, the Hopi, the Maya, and the Incas. With the immigration of Europeans to the American continent (about five hundred years ago), these indigenous peoples suffered the loss of their hereditary lands, their cultural identity, and their lives. Many of their descendants in North America still live on the circumscribed "reservations" that their ancestors were forced onto by the armies of the

United States under the auspices of the mainly European immigrants who now rule their lands.

Beginning early in the sixteenth century, peoples from several Black African nations were captured by slave traders and shipped to the North American continent, where they were forced to work as slaves on the lands of recent European immigrants. These Victims of over three hundred years of disgraceful injustice finally attained their long-sought and long-deserved emancipation, but only after the bitter American Civil War at the end of the nineteenth century.

In Chapter 9, "African-Americans, Crime Victimization, and Political Obligations," Bill Lawson graphically writes of the descendants of African slaves. After suffering the injustices of slavery, these African-Americans (Black-Americans) are now, according to Lawson, "disproportionately" suffering higher rates of victimization from violent crime. He raises the question of whether "insufficient police protection" in African-American neighborhoods "constitutes governmental oppression." If so, it would be a sad and disgraceful reminder of that earlier period of governmental oppression. Lawson also questions the legal obligations of African-Americans today, in a society that does not live up to its "social-contract" obligation to protect all its people equally and fairly. (Further discussion of the social-contract theory appears later in the present chapter.)

The terrible injustices wreaked on 110,000 Japanese-Americans during World War II, 80 percent of whom had been born in the United States, are dramatically portrayed in Chapter 19 by Michio Kaku in "Behind Barbed Wire: The Wartime Incarceration of the Japanese-Americans." Kaku reveals that, although charges were never presented against them, "These citizens lost everything: their land, savings, businesses, and personal belongings." They were "Forcibly placed in horse stables, behind barbed wire and machine guns"; their only crime was their Japanese heritage. Although the U.S. Congress awarded them "reparations" nearly fifty years later, "the amount was a minute fraction of the lost assets" and certainly an insignificant repayment (most are receiv-

ing only \$2,000 a year for ten years) for the severe mental, emotional, and physical stress suffered by these citizens. Actually, many of those incarcerated have since died, and will not receive any reparations. What may be most striking is the fact that the U.S. Supreme Court ruling "that the incarceration was constitutional" has never been overturned. Kaku is most concerned that such "crimes against entire peoples never take place again in America." He ends with an admonition that "it will depend upon all the citizens" of our country to ensure that such an event will never recur.

Caplan, in Chapter 18 discussed earlier, presents a cogent argument supporting the private possession of guns as a fail-safe means of protecting people from political despots and dictators. He dramatically supports his opposition to weapons control laws (which require registration and listing with the government of the names and identification numbers of gun owners) by citing the greatly outnumbered Jewish Resistance Fighters in the Warsaw Ghetto, who, in 1943, effected a brief but brave and impressive protest against the Nazi war machine. The few handguns the Jews possessed delayed the Nazi armies from entering their Ghetto for three long and precious months, at a cost of "considerable casualties" to the Nazis. Easier access to handguns might have delayed the Nazis even longer and might have caused them even more fatalities. Caplan postulates: It would also have enabled other potential Victims to learn of the Jews' limited successful resistance, and to use it as a model for resistance elsewhere or even to deter the Holocaust.

All of these crimes of injustice exemplify apparently uncivilized acts by presumably "civilized" peoples and nations.

WHY THE PAUCITY OF VICTIMS' RIGHTS LEGISLATION?

Why haven't the general public and their political representatives fought for more Victims' rights, compensation, restitution, and retribution (e.g., medical, psychological, psychiatric, and monetary)?

Is it because people do not sympathize with the Victim?

Is it because the public does not believe that Victims deserve such recognition?

Is it because people believe that Victims cause or encourage their own victimization (e.g., enjoy victimhood or being labeled a Victim)?

Is it because people worry that bringing more attention to the problem may cause it to increase rather than decrease?

Is it because it may cost too much in money and resources (e.g., police, courts, and prisons) to provide for Victims' rights?

Is it because people believe that everyone has problems, and they don't have the time or patience to think about solutions to other people's problems?

Is it because people fear that by identifying with Victims they may become Victims themselves? Conversely, is it because people believe that, by avoiding thinking of or discussing the problems of Victims, they will somehow protect themselves from suffering a similar fate (i.e., if one doesn't think about a problem, it will go away)?

Is it because the public perceives the criminal justice system as doing its job in punishing criminals and thereby vindicating Victims' rights?

Whatever the purported reasons, the effect remains the same: Victims are regarded as obscure or unimportant, even invisible (Reiff, 1979). The suffering and plight of Victims, until recently, have been neglected in the minds and actions of legislators and chief executives of government, and even by those government agencies set up to support, protect, and defend Victims.

THE SOCIAL-CONTRACT THEORY OF PREVENTING VICTIMIZATION

One approach to the questions "Why do we have Victims of crime and injustice?" and "Who is responsible to these Victims?" is to be found in the social-contract theory. The theory is traceable to the ancient Greek philosophers, and the later writings of three

men—Thomas Hobbes (1964) and John Locke (1955) in the seventeenth century (see Halbrook, Chapter 21) and Jean-Jacques Rousseau (1950) in the eighteenth century (see Fell, Chapter 6)—who contrasted the “natural state” that ancient humans lived in, with the societies of nation-states (i.e., governments that were formed later, with uniform sets of rules and laws). According to social-contract theory, citizens give up some of the rights and freedoms they enjoyed in their “wild” or “natural state,” to obtain the benefits derived from societies and governments based on rule by law. If this thesis is correct, then governments and societies owe their citizens adequate protection against criminals and against becoming Victims of crime and injustice.

De Seife, in Chapter 5, and others discuss the historical and philosophical background of the social contract, and de Seife also offers thirteen suggestions to place “crime victims’ rights on a par with those of the criminal and society,” under the social-contract approach. Among these suggestions are that parents should be held responsible for the acts of their children, punishment for criminal acts should be aimed at restitution to Victims, criminals should work inside and outside prisons to repay (at least partially) the costs of their crime, and all individuals in society, including those on welfare, should have higher standards of living than prisoners.

Until some years ago the scorecard favored this social-contract arrangement. But rapidly escalating rates of crimes dramatize the failure of governments to maintain their part of the social contract, to provide for protection against criminal victimization and injustices.

Several contributors question the failure of government to live up to its part of the contract (see Chu’s Chapter 8, “A Systems Science Approach to Crime, Criminal Justice, and Victim Justice” and Lawson’s Chapter 9). Lawson raises the question that, if our government is not adhering to its responsibility, should we, as citizens, be required to adhere to ours, including the responsibility of being law-abiding citizens? Although this viewpoint may appear to be “lawless” and anarchistic, we should realize that reciprocity is an important component of any social order. Gilbert

S. Fell, in Chapter 6, "Street-Crime Victim Compensation, Retributive Justice, and Social-Contract Theory," speaks of the breakdown of the social contract, necessitating our falling back on our "national instinctive sense of justice to provide properly for the victim," as part of our political obligation to our citizens.

SOME OTHER FORMS OF VICTIMIZATION

Thus we present, in this book, a broad spectrum of Victims of crime and injustice. However, there are other examples we have omitted—not because they are less important, but primarily for want of space.

One such example was reported by Peter T. Kilborn, in "Unseen Sentinels in the Workplace" (1990), in which he describes what could be called Victims of computer abuse: employees who are monitored by computers that record and analyze "in micro-chip detail" their volume for work and the time they spend at their terminals. Adding insult to injury, supervisors chastise those employees who stand up at their terminals to break the monotony of their job and obtain some physical relief. Standing up and defying the rules, one airline's reservations computer worker said, "is a way to show I'm a person." Suffering sore wrists, eye strain, invasion of privacy, depression, and other symptoms of stress in these "dehumanizing human pressure cookers," Kilborn reports, these employees believe that they have become mere cogs in a modern-day "electronic sweatshop."

In contrast to these Victims of modern technology are the Victims of teacher-administrator-student harassment and abuse: physical, ethnic, sexual, and/or mental, at the preschool, elementary, secondary, college, and professional levels of education. They are indefensible examples of victimization of minds and bodies, more harmful and inexcusable because they occur in the fundamentally vital profession of education. Also omitted were drug addicts and Victims of drug company abuse (Kolata, 1991), of elderly abuse, of abortion, and of all forms of religious discrimination, as well as Victims of cultural mores, including severe and

bizarre mutilations of the body such as the Dani's custom of having the ends of one's fingers chopped off as an expression of grief at the death of a close relative.

We cannot forget the Victims of animal abuse and, perhaps the most threatening to the survival of all life, the abuse of our planet Earth, including the devastating effects of the human destruction of precious rain forests and the myriad forms of plant and animal life in them (many not yet discovered or identified). In return, we humans are Victims of the Earth, in devastating natural disasters, earthquakes, volcanic eruptions, tornadoes, hurricanes, typhoons, lightning, tsunami, and other occurrences that reveal the power of nature over humans even in this age of advanced technology.

All the examples of victimization need careful attention, study, and exposure to the bright light of objective inquiry and discussion. Only then can we hope to find solutions to these forms of unnecessary suffering.

Thus this book depicts some of the myriad problems that beset Victims of crime and injustice. It also presents some proposed solutions, and we hope that it will raise more questions to be discussed and answered. We invite the reader to join in this dialogue, for we believe that more discussion of these issues will increase both hope and the probability of meaningful solutions for all Victims.

REFERENCES

- Brooke, James. (1989). "For an Amazon Indian Tribe, Civilization Brings Mostly Disease and Death." *The New York Times*, December 24, p. A6.
- Brennermiller, Susan. (1975). *Against Our Will*. New York: Simon & Schuster.
- Butterfield, F., and Taber, B. W. (1991). "Woman in Florida Rape Inquiry Fought Adversity and Sought Acceptance." *The New York Times*, April 27, p. A17.
- CB's Radio. (1991) (News Item). New York: Columbia Broadcasting System, April 20.

- CBS Radio. (1991). Report on Medicine. New York: Columbia Broadcasting System, June 18.
- The Concise Oxford Dictionary of Current English*. 8th ed. (1990). R. E. Allen, Ed. Oxford: Clarendon Press, p. 1368.
- Epstein, Joseph. (1989). "The Joys of Victimhood." *The New York Times Magazine*, July 2, pp. 20–21, 39–40.
- Fattah, E. A. (1989). *The Plight of Crime Victims*. New York: St. Martin's Press.
- Hobbes, T. (1964). *Leviathan*. New York: Washington Square Press.
- Kantrowitz, Barbara, with Gonzalez, David L. (1990). "Still Shocking after a Year." *Newsweek*, July 23, p. 46.
- Kilborn, Peter T. (1990). "Unseen Sentinels in the Workplace." *The New York Times*, December 23, pp. A1, A18.
- Kolata, Gina. (1991). "Drug Makers Didn't Heed Warning on Deadly Effect." *The New York Times*, July 4, pp. A1, A10.
- Locke, J. (1955). *Of Civil Government*. Chicago: Henry Regnery.
- Margolis, Maxine. (1991). "Blaming the Victim: Ideology and Sexual Discrimination in the Contemporary United States." In E. Angeloni (Ed.), *Anthropology 91/92*. Guilford, CT: Dushkin.
- NBC-TV. (1991). *New York City*, April 16.
- Random House Webster's College Dictionary*. (1991). New York: Random House, p. 1485.
- The Record* (newspaper). (1991). "U.S. Leads World in Violent Crime." Hackensack, NJ, March 13, pp. A1, A10.
- Reiff, R. (1979). *The Invisible Victim*. New York: Basic Books.
- Rousseau, Jean-Jacques. (1950). *Social Contract and Discourses*. New York: Dutton.
- "She Asked for It." (1989). *Oprah Winfrey*. Chicago: Harpo Productions, Capital Cities/ABC Network, October 17.
- Sullivan, Ronald. (1990). "Lawyer Tries Grilling Jogger on Park Rape." *The New York Times*, November 3, pp. A27, A29.
- Turque, Bill, with Underwood, Ann. (1990). "Judgment for the 'Wilder': A Rape Verdict in the Central Park Jogger Trial." *Newsweek*, August 27, p. 39.
- United Press International. (1991). "Don't Name Rape Victims, 77% in Poll Say." *The Record* (newspaper), Hackensack, NJ, April 21, p. A6.
- "Verdict of Shame " (1990). *A Current Affair*. New York: STF Productions, Inc., Fox Network, Fox Television, October 29.
- Webster's New Universal Unabridged Dictionary*. 2nd ed. (1983). New York: New World Dictionaries Simon and Schuster, p. 2036.

Perspectives on Victims

He threatens many that hath injured one.

BEN JONSON (1573–1637)

Violence commands both literature and life, and violence is always crude and distorted.

ELLEN GLASGOW (1874–1945)

Of all tasks of government the most basic is to protect its citizens against violence.

JOHN FOSTER DULLES (1888–1959)
(U.S. Secretary of State, 1953–1959)

The public do not know enough to be experts; yet enough to decide between them.

SAMUEL BUTLER (1835–1902)

Survivors of Crime

MARLENE A. YOUNG, PH.D., J.D.

INTRODUCTION: NEW LAWS FOR VICTIMS

For almost two decades, public interest in victim services and victims' rights has grown markedly. As a result of victim advocacy, the face of justice in the United States has changed dramatically. Some of the progress along these lines can be summarized as follows:

- Forty-nine states, the Virgin Islands, and the District of Columbia have established victim compensation programs, which provide financial assistance to crime victims suffering injuries as a result of criminal attack or to survivors of loved ones who have been victims of homicide.¹
- Forty-eight states have enacted some type of bill of rights for victims.²
- Forty-seven states have passed legislation allowing the use of "victim impact statements" by judges at the time of sentencing.³
- The federal Victim and Witness Protection Act was signed into law by President Reagan on October 12, 1982.
- The President's Task Force on Victims of Crime was established and issued a report in December 1982 that included sixty-eight major recommendations on funding for victim

services, federal victim compensation, better treatment of victims, and a proposed constitutional amendment ensuring the right of victims to be informed, present, and heard at all critical stages of criminal justice proceedings.

The federal Victims of Crime Act of 1984 was enacted on October 12, 1984, and now provides, through a series of amendments, for annual funding of up to \$125 million through 1991 and \$150 million thereafter for state compensation programs and local victim service programs.

In 1986, Rhode Island became the first state to pass a constitutional amendment to provide protection to victims of crime.

In 1988, both Michigan and Florida passed state constitutional amendments based upon the recommendations of the President's Task Force.

Although this progress indicates the struggles of the past and the starting point for the future, the painful reality is that, even though some policies may have changed and some help to victims may have been given, we are far from victory in preventing victimizations. In 1990, 34,775,840 crimes were committed. That fact translates into the following numbers every day: 14,354 homes burglarized, 12,783 people assaulted, 303 women raped, 64 people dead because of murder and nonnegligent manslaughter, and 61 drunk driving fatalities (U.S. Department of Justice, 1991).

Those statistics mean nothing unless they are translated into the individual tragedies they represent. Tragedies are reported as mere numbers, so that some people are reported as slain, some people as shattered, and some people as surviving—but the numbers fail to show how all are scarred.

Much has been written about what to do to alleviate the long-term sufferings caused by these tragedies. What is even more important is an understanding of each tragedy itself as it occurs. Without confronting that immediate pain and heartache, some may forget about what should be the central concern in every crime: the immediate victim.⁴

Case examples⁵ drawn from people who have reached out to the National Organization for Victim Assistance for help illustrate the devastating consequences of crime:

- A bright, articulate elderly woman now lives in southeast Washington, D.C. Fourteen years ago, three men dragged her off a sidewalk and into a car. She was screaming and fighting. They took a lead pipe and beat her, smashing her skull. Then they drove to an isolated area and raped her, leaving her for dead. She survived. She survived with permanent brain damage and spinal injuries. She survived and saw her husband leave her because he couldn't take her pain anymore. She survived without help, without a friend. She called our office and struggled to speak over her tears. "I'm sorry," she said, "for taking your time. I'm sorry, but I need help. I don't know what to do."
- There was a jovial mood after work one Friday night at a local pub. But the mood was interrupted by a young man who opened the door, came in, pulled out an automatic pistol, and began shooting. Twenty-one individuals were the victims of the slaughter. Four were killed outright. Seventeen others were wounded. One is now a quadriplegic. He owes \$38,000 in medical bills, has exhausted his claims to medical insurance and victim compensation, and faces a life on welfare.
- Our telephone rang at 4:30 A.M. on the day after Valentine's Day in 1983. It was a mother whose only son had been shot and killed on her front doorstep on Mother's Day 1982. She had watched her son die. She had been asked by the police what her son had done to make someone want to kill him. She had been told by the prosecuting attorney to stay out of the courtroom because she would upset the jury. She had been told by her friends that she should forget about it and go on living her life. She was a mother who had to call a strange office halfway across the country because she could not find any help in her own city.⁶

These people and their immediate pain are not easy to face, but actually living with that hurt, day in and day out, is so much worse. Countless victims are living that nightmare now. They know the outrage and the sorrow. They know the numbness and the nausea. And in spite of it—perhaps because of it—they are surviving.

The concern of this chapter is that others who have not been forced to experience that pain should try to understand the emotional consequences of survival—what it does to the victims and those around them.

Three primary injuries can be identified as causing major distress to victims: financial injury or loss, physical injury or loss, and emotional trauma. It is these injuries, as well as what some have called the *second injury* (additional insult caused not by the criminal directly, but instead, by the very agencies or institutions that should be helping), that are appropriate to examine in the wake of survival.

FINANCIAL INJURY

The economic cost of crime is stunning. In 1985 (based on information from the U.S. Bureau of the Census), the gross loss to the United States economy because of crime was estimated to be \$174,000,000,000, but most people cannot begin to fathom the meaning of that figure. Many argue that financial injury is both easy to understand and easy to remedy: with appropriate legislation, economic loss can be compensated and property loss replaced. On the face of it, that seems to be true, but upon closer look, it is clear that unless the injury is perceived through the eyes of the victim, the impact of the loss may be completely missed and the remedy totally inadequate.

Vandalism may be treated as a misdemeanor in most jurisdictions and is considered a daily risk of life in some communities. The pervasiveness of vandalism and its seeming insignificance make it a low priority for both law enforcement and victim

reparations, but the consequences of vandalism may be overwhelming.

One elderly paraplegic spent a number of months confined to his home after vandals had destroyed the access ramps to and from his doorways. He had no way of moving his wheelchair off his porches and could not afford to have repairs made.

Another man of modest means had to spend over two thousand dollars in one year for the repair of damages to his home caused by repeated incidents of vandalism. He finally moved from his home to another part of the city, suffering a severe financial loss in return for occupying an apartment in a secure building.

Burglary, another crime associated with financial loss, can also be ominous. Most victim compensation programs do not pay for property loss. Private insurance programs are quite inadequate because of "deductibles" and recoveries limited to "market value," which severely undervalues stolen property. It may take years to find replacements for some items, and property with sentimental value is gone forever.

PHYSICAL INJURY

Society's approach to bodily injury is similar to its approach to financial loss. Injuries can be treated medically, and rehabilitation can be provided for the victim who faces permanent physical losses, but society's response is designed more to shield outsiders from the shocking realities of crime than to look directly into the victim's pain.

Elderly victims may die as a result of what some consider minor physical injuries, such as a broken wrist, hip, or leg, in an ordinary purse or wallet snatching. They may die because they are more fragile, and they may otherwise require nursing homes or hospital care to recover. Gerontologists can testify to the negative effects that such long-term relocations have on mental depression, physical morbidity, and mortality rates.

Victims of permanent physical injury often not only face a life of severe pain but also must cope with a whole new identity—one for which no one has prepared them. Barbara Kaplan (1983), a victim of a sudden, random shooting in which she lost her right eye, writes:

I was initially afraid to look at my damaged eye. When I finally did look I was horrified: there was no eye—only a sunken socket. Each time I changed my patch, I had to steady myself before looking in the mirror.

After repeated visits to doctors, I began to understand that I would never look the same again. . . . And because of my depression and guilt, I sometimes doubted that I deserved to look better. . . . I felt like a freak. A part of me was missing, and I felt defective. . . . The shooting had transformed my identity. At 31, I had seen myself as bright and pretty, a talented social worker, a new wife and homeowner. Afterward, I was "The Woman Whose Eye Was Shot Out"—no longer pretty, no longer working, no longer competent.

How many people could endure such tragedies without long-term tremendous suffering and grief? Unfortunately, those feelings have yet to be understood by either the justice system or society.

The worst of all physical injuries is death. So often, murder is thought of as having one victim: the deceased. Indeed, in some respects the more serious victims are the ones who remain living, the loved ones of the murdered. These victims face a life full of emptiness and heartaches—a life wedded to sorrow.

EMOTIONAL INJURY

While financial loss and physical injury are the kinds of victim issues which society finds easiest to deal with, it is the emotional injury that stabs the deepest and lasts the longest. It is the human pain of living in the wake of the destruction of

property or person that constitutes the major impact that these episodes cause.

It is also the emotional aftermath of crime that is most neglected, a neglect that is seen in the way that the victim is often shunned by the rest of society and depersonalized by our criminal justice system. It may be that of all the injuries, it is the emotional suffering that is least likely to be redressed by legislation and that depends mainly on the help of friends, family, and others.

Emotional reactions to crime consist of three typical stages: (1) the acute crisis stage, involving shock and sometimes immediate rage or terror; (2) the emotional effort to survive, involving anger, depression, illness, and grief; and finally, (3) a stage that might best be termed "living after death." In reviewing these stages, the focus will be on the hardships of victims who have yet to be truly recognized as victims: those whose loved ones have been murdered.

Acute Crisis Stage

Professionals tell us that the human response to crisis tends to follow certain basic patterns. Biologically, we are programmed to react to extreme stress by what has been called the *fight-or-flight syndrome*. Under extreme stress, normal emotional and rational responses may be momentarily suspended. When the crisis is extraordinary, most people go into shock. Although there is generally some familiarity with physical shock, as most people have had some exposure to minor physical injuries, nevertheless most of us have not experienced or are not familiar with emotional shock.⁷

Emotional shock parallels physical shock. It numbs and anesthetizes the body. Shock is particularly manifested in crime victims and their loved ones, because no one expects to become a victim or to learn that a family member has been victimized.

Most people are taught all of their lives that if they live a good life, if they work hard and follow certain rules, they will be reasonably happy. No one tells them that violent crime and other

capricious cruelties happen to good people. No one tells them, because no one wants it to happen that way.

Therefore, the most common expression of shock in crime victims is denial and disbelief. How often victims have said, "I can't believe it", "This isn't real", "This isn't happening"; "It's a nightmare—I'll wake up and it will be all over." Sometimes, even long after the victimization, those who have lived through that unbelievable shock awaken in the morning and think sleepy thoughts about the time before the event—only to remember, as they become fully awake, that nothing will ever be the same again.

Shock is also evident in people who have been told that a friend or a family member has been murdered. No one deals well with death. It is hard to lose a loved one. It is hard suddenly to adjust to never seeing someone again, hard to believe that someone has left your life permanently. As hard as that is, the agony of dealing with death is made most excruciating when it has occurred as a result of murder—a brutal, senseless, but intentional act. Separately, crime and death may each be hard to understand, but **murder is incomprehensible.**

Shock may last for minutes in some victims and for months or years in others. During this time, victims may feel they are in a fog. Some find that the daily routine—getting up, working, shopping—is a heavy burden. Even those who function normally, calmly, and matter-of-factly sometimes feel that they are living in a dream. Such an appearance of normality in a victim is sometimes viewed as a manifestation of strength, yet what has often happened is that the victim has not yet fully understood the enormity of the criminal event. One mother, a year after her daughter had been murdered, said, "I go on because a part of me doesn't believe that what I'm saying or doing is true."

The acute crisis stage may be accompanied as well by almost inseparable emotions of outrage, grief, and pain. Crime rarely gives the victim a fair chance to strike back. One of the debilitating effects of a criminal attack is that it makes the victim and his or her family feel helpless and without control. There is little doubt that

this montage of emotion is a natural immediate aftermath. There is the "Why me?", the "Why him?", and the just plain "Why?" reaction. The mind seeks to fit this bizarre and cruel event into a "normal" world and to find logical answers in vain: there aren't any.⁸

Efforts to Survive

The acute crisis stage may extend for days or months. However, for most victims it is accompanied by a human attempt to survive. Those victims who get stuck in the denial syndrome and avoid talking about or confronting the crime may well suffer long-term acute physical and emotional pain.

In the effort to survive, initial anger at the event is understandable, as well as anger at a system of justice that has failed to protect and failed to respond to a victim's needs. Initial grief may merge into patterns of mourning: whether for loss of property in a burglary, loss of a most precious part of oneself in a rape, or loss of a loved one in a murder—and, always, for loss of trust, security, and autonomy. The anger and the mourning are healthy, but for most there is little consolation in those; in fact, they may add to the feelings of guilt that tend to plague the efforts to survive.

Guilt manifests itself in victims of all types. If a victim can find out what he did wrong, then he can understand, but understanding is not that easy. The burglary victim feels guilty because he hasn't put enough locks on the door. A rape victim feels that somehow she precipitated the attack—perhaps through her attractive appearance or some vague gesture.⁹ Some victims of random violence feel guilty because they lived, whereas an acquaintance who suffered through the same attack died. That feeling also touches survivors of homicide victims. Siblings and parents often wonder why God didn't kill them instead of a brother or a daughter, but the guilt of a survivor of a homicide victim is even more complex. Many parents and friends are visited by further guilt: "I should have been a better parent"; "I shouldn't have been

angry at him". "I shouldn't have told her to break off with her boyfriend". "If I had been a better friend, I could have saved him."

Survival is often coupled with the need to confront the crime and to confront the loss.

Survivors of homicide victims talk of a wide range of needs based on a wide range of coping reactions. There may be:

- A need to know the details of the death.
- A desire to know what the victim felt during the final moments of life.
- A need to visit not only the victim's grave but the graves of other victims.
- A need to be intimately involved with the prosecution of the accused killer.

Survivors of rape often talk about:

- The need to remember the crime—to relive it over and over
- The need to talk to men—to learn why men rape
- The need to look in the mirror—to see if they are still the same.

Survivors of burglary are embarrassed by:

- A desire to destroy remnants of property vandalized or reminders of property stolen.
- A need to clean the house, to remove all "stains" of the crime
- A need to move away from the home because of a constant gnawing fear of a burglar's reentering.

This stage is also often complicated by long-term chronic depression. Such depression exists, in part, because of the frustration of survival, the weariness of grief, and the ever-haunting guilt. More often, it is generated by the "second injuries" done to crime victims by society and the criminal justice system.

Social reaction generally is unkind to crime victims. Others don't offer help to victims of crime; they ostracize and stigmatize them:

- There is *isolation*: Families of homicide victims speak of losing up to 90 percent of their friends because no one wants to talk about the crime and no one wants to hear about the victim. Some members of the clergy may try to console survivors by telling them that the crime was the will of God. The result of that attempt at consolation may isolate the survivors from their God and destroy their faith.
- There is *blame*: The blame of others only aggravates the self-blame, the guilt. People will say that a burglary victim shouldn't have left his door unlocked, that a rape victim shouldn't have been walking down the street. Some people even hint that the homicide victim brought the murder upon himself or that his parents were to blame for not taking care of their child.
- There is *ignorance*: Society dictates that victims should get over their grief, get over their anger, forget about the crime, and get on with their lives. How can one forget a loved one? How can one forget a rape? Perhaps one can go on—but how can one forget? Forgetting speaks to the need of society to ignore the magnitude of pain; it does not speak to the needs of the victims.

The reaction of those around the victim is often unkind, but the reaction of the criminal justice system is often downright cruel. Survivors (e.g., relatives) of homicide victims face the worst type of justice. They, more than any other kind of victim, face a system that has refused to acknowledge that they even exist:

- Survivors of homicide victims may often face extraordinary costs imposed by the investigation of the murder. One mother was told she could not retrieve the van of her murdered son

unless she paid \$1,200 worth of storage fees that had accumulated since the van had been impounded months earlier as possible evidence.

- Many survivors are denied information about a criminal case because they aren't the victim, the "complaining witness," or any other kind of prosecuting witness. A young woman was told by the district attorney that she couldn't get any information about the murder of her grandfather because she wasn't the victim. Another victim approached the judge in her daughter's murder case to ask if she could say something at sentencing. The judge waved her away, saying, "She's dead. I have to worry about the defendant, he's living."
- If a prosecution goes forward, survivors may be denied entrance to the courtroom because they may "bias the jury" with their tears and emotions. Yet it is unfashionable and an anathema to suggest that the defendant's family and friends—or the defendant himself or herself—be denied access to the trial because his or her emotions may "bias the jury." In fact, the defendant is the only potential witness allowed to remain in the courtroom throughout the entire trial because he or she has a constitutional "right to confront" his or her accusers. In most jurisdictions, all other witnesses are barred from the courtroom until they testify on the theory that they may alter their testimony if they hear other testimony. The victim, if never called to testify (i.e., as a witness), thus has no right at the trial to confront his or her attacker.
- In fact, victims do not even have the right to have their cases prosecuted by the criminal justice system. Survivors of homicide victims tell of case after case where a prosecutor has refused to prosecute for a variety of reasons—none of which took into account the feelings or concerns of the survivors. In most other Western nations, the victim has some ability to insist that a criminal be prosecuted. She or he has some right to be heard¹⁰.

Living after Death

In light of these social indignities and criminal injustices, it is a wonder that crime victims do indeed become survivors. The increasing number of victim activists in this country demonstrates that a person can learn to live again after a crime and can survive after the wanton death of someone they love. It isn't easy. It is an existence filled with heartache—a life in which the anniversaries of the murder and traditional family holidays are special, sad times of remembering the missing; a life in which undercurrents of grief may destroy what family and friends remain; and a life in which life itself has been brought into question, and the answer was death.

It is those living victims who defy their predators, the killers. It is those victims, for whom victim studies, victim research, and victim policy should be written. It is they who know that in all of us there is a need to reach out and hear that someone else is there, that someone else knows this sorrow, and that someone else has had the strength to go on. It is they who illustrate that there is a need to turn random, senseless crime into something meaningful: a social network and a branch of public service that provides solace, comfort, and protection to our victimized fellow human beings.¹¹

THE CHALLENGE FOR US ALL

Those who have been victims or who have served them know that sometimes, in the fight to survive, it seems as though the night is closing in, and that no matter how hard they try to stay the tears, darkness will swallow them. They know all too well both the pain that criminals inflict and the ways in which others compound those hurts. But the gloom must be dispersed with resilience, for they know, too, that much of that harm can be reduced and, yes, eliminated through enlightened policies and compassionate people. They are not alone in their struggles nor in their beliefs.

Others can be persuaded to listen and to act. With their help, this nation can return kindness and trust to an unjust world; and this nation then can establish across the land, once and for all, justice for all—even for the victims.

NOTES

1. Maine is the only state that does not have any provisions for compensation for victims. South Dakota's legislation goes into effect July 1, 1992.
2. New Hampshire and Wyoming do not have a Victims Bill of Rights (Delaware has a resolution on victim rights).
3. Hawaii and Alabama do not have legislation allowing victim impact statements. Alabama does, however, allow victim impact statements "by procedure."
4. The following source expands on the material covered here: Young, 1990a.
5. All case examples are drawn from case files of the National Organization for Victim Assistance, an organization that not only is an umbrella organization for victim service programs, an advocate for public policy change, and a family to its members but maintains a twenty-four-hour hotline for victims and survivors of crime to call for services as needed. The hotline number is (202) 232-6682.
6. The following sources expand on the material covered here: Denny, 1982; Miles, 1980.
7. The following sources expand on the material covered here: Selye, 1956; Selye, 1974.
8. The following sources expand on the material covered here: Young, 1989; Young, 1991.
9. The following sources expand on the material covered here: Burgess and Holmstrom, 1974; Burgess and Holmstrom, 1976.
10. The following sources expand on the material covered here: Young, 1990b; Young, 1991.
11. The following sources expand on the material covered here: Young, 1990b; Young, 1991.
12. The following sources expand on the material covered here: Young, 1989; Young, 1990b; Young, 1991.

13. The following sources provide additional useful information on the materials covered in this chapter: Bard and Sangrey, 1979; Gist and Lubin, 1988; Ochberg, 1988; Pasternak, 1975; Perspectives on Proposals for a Constitutional Amendment. . . . 1987.

REFERENCES

- Bard, M., and Sangrey, D. (1979). *The Crime Victim's Book*. New York: Basic Books.
- Burgess, A. W., and Holmstrom, L. L. (1974, September). "Rape Trauma Syndrome." *American Journal of Psychiatry*, 1982.
- Burgess, A. W., and Holmstrom, L. L. (1976). "Rape: Its Effects on Task Performance at Varying Stages in the Life Cycle." In J. J. Walker and S. L. Brodsky (Eds.), *Sexual Assault*, pp. 23-33. Lexington, MA.: Lexington Books.
- Donnelly, K. F. (1982). *Recovering from the Loss of a Child*. New York: Macmillan.
- Gist, R., and Lubin, B. (Eds.). (1988). *Psychosocial Aspects of Disasters*. New York: Wiley.
- Kaplan, Barbara. (1983). "Aftermath of a Shooting." *The Boston Globe Magazine*, March 6.
- Miles, M. S. (1980). *The Grief of Parents When a Child Dies*. Oak Brook, IL: Compassionate Friends.
- Ochberg, F. (Ed.). (1988). *Post-Traumatic Therapy and Victims of Violence*. New York: Brunner/Mazel.
- Pasternak, B. (Ed.). (1975). *Violence and Victims*. New York: Wiley.
- Perspectives on Proposals for a Constitutional Amendment for Providing Victim Participation in the Criminal Justice System. (1987, Fall). "A Symposium Issue." *The Wayne Law Review*, 34(1).
- President's Task Force on Victims of Crime. (1982, December). *Final Report*. Washington, DC: Government Printing Office.
- Selye, H. (1956). *The Stress of Life* (rev. ed.). New York: McGraw-Hill.
- Selye, H. (1974). *Stress without Distress*. Philadelphia: J. B. Lippincott.
- U.S. Bureau of the Census, Department of Commerce (1988). *Statistical Abstract of the United States, 1988*. Washington, D.C.
- U.S. Department of Justice. (1991, April). "Criminal Victimization in the United States, 1990." *Bureau of Justice Statistics Data Report*

- Young, M. (1989). "Emerging Issues in Victim Assistance." *Pepperdine Law Review* (Winter) 17(1).
- Young, M. (1990a, February). *National Crisis Response Team Training Manual*. Washington, DC: National Organization for Victim Assistance.
- Young, M. (1990b). "Victim Assistance in the United States: The End of the Beginning." *International Review of Victimology*, 1: 181-199.
- Young, M. (1991). "Crisis Intervention and the Aftermath of Disaster." In A. R. Roberts (Ed.), *Contemporary Perspectives on Crisis Intervention and Prevention*, pp. 83-103. Englewood Cliffs, NJ: Prentice-Hall.
- Young, M., and Stein, L. (1983). *The Victim Service System: A Guide to Action*. Washington, DC: National Organization for Victim Assistance.

Thoughts About Victims of Crime and Injustice and the Nature of Justice

MAX HAMBURGH, PH.D.

INTRODUCTION

One night three thugs entered my friend's office at about 7 P.M., held a gun to his temple, and demanded that he turn over all his cash and valuables. The request was granted with more than deliberate speed. The three soon departed. My friend somewhat incoherently called the guard, who notified the police, who gave chase and caught the culprits.

My friend was summoned to the police station to file a complaint and to identify his uninvited guests. By the time his complaint could be heard, it was 11:00 P.M., because the arrested men had to be properly booked, physically examined, and read their rights. Then the three men were escorted to jail for a good night's sleep, until the posting of bail.

My friend, in turn, was asked to leave the police premises unescorted—an invitation he politely declined because it was now past midnight and he felt in no condition to risk another brush with muggers, either on the way from headquarters to the subway, or in the subway itself, or on the way home from the subway.

A "compromise" was reached: he was allowed to spend the night until 6 a.m. the following morning on a wooden bench at police headquarters.

The story illustrates for me a good deal of the asymmetry between the criminal and the victim, an issue that much of the rest of this book addresses.

CONCERN WITH BASIC QUESTIONS OF ETHICS

Whenever I have spoken or written of victims of crime and injustice (Hamburg, 1980a, 1981a, b) the most frequently encountered response has been "What is there to write about?" Yet everybody agrees that something should be done about crime and injustice, and that it is too bad that, as yet, not much has been done.

For the benefit of those who hold that there exist no universally shared basic premises on which a theory of justice can be constructed, let us agree, at least as a very minimum, that those who hold membership in Western society share a set of beliefs or prejudices that generally enable them to agree, at least approximately, on what is considered fair or unfair, just or unjust. The issue of victims of crime and injustice, although it may have major legal implications, appeals first and foremost to these shared elementary moral sensibilities.

In other societies, "utilitarian considerations"—either political, economic, or legal—of what "ought to be" are more easily separated from moral considerations than in America. Any recommendations for changes in the social contract in America are always reinforced by appeals to "moral truths." Americans have a historical commitment, if not a preoccupation, with morality. In fact, the initial blueprint of the American political organization is decorated by a set of moral beliefs proclaimed to be self-evident to anyone who is capable of exercising his or her power of reason.

Hidden beneath the issue of victims of crime and injustice are

also basic ethical questions. Any recommendations for changes will have to be justified by whatever "theory of justice" one holds.

My contribution, as a biologist, to such discussions is based on my belief that an interactive discussion among ethicists and scientists interested in questions of ethics should be advantageous and beneficial to our understanding and discussion of "theories of justice." The precedent for this type of dialogue is seen in the philosophers' interest in seeking confirmation from science for their value judgments and speculations. Nothing was more pleasing to the classical philosophers than to prove that their ethical theories were in accord with natural law. Indeed, physics in Newton's time was known as *natural philosophy*. Granted that science is no longer the sacred cow it once was, and in spite of its somewhat tarnished reputation, it is still being invoked to justify and reinforce nearly every ideology that has moved the minds of humans in the twentieth century. All modern ideologies and blueprints for a new and better social order seek proof and confirmation from science that their basic assumptions about the nature of humans or of society are correct, much in the manner in which new religious doctrines and heresies previously rested their cases on assertions that their novel and unorthodox view was really based on a correct interpretation of the word of God.

Whether the excursion of natural (i.e., life), physical, and social scientists, as well as philosophers, into one another's territories is productive or counterproductive for each discipline has been argued at length. The fact that the temptation persists for a biologist like me to philosophize and for ethicists to seek confirmation for their theories in biology and the other sciences proves that Oscar Wilde's advice (1989) "that the only way to get rid of a temptation is to give in to it" was a good one.

To the question "What can sociobiology, genetics, anthropology, or evolutionary theory contribute to normative ethics?" philosophers will reply, "Nothing whatsoever," and will dismiss much of the speculation let loose upon the unsuspecting public by us life scientists as irrelevant revivals of the "naturalist fallacy."

Life scientists, on the other hand, will insist that from such questions as (1) "How did benevolent behavior evolve?" (2) "Does it make biological sense?" and (3) "Are we genetically programmed for altruism and cooperation?" some spinoff can be obtained that could be helpful in the search for an ethical formula or a theory of justice (Hamburg, 1980a,b). Consequently, to allow amateur "outsider" life scientists, like me, to enter into the arena of ethical debate may not be a total waste of philosophers' time after all, even if listening to our intellectual pretensions may do nothing more than sharpen the arguments of the ethicists. We "amateurs" may have another function in discussions to which only professionals are usually admitted. Being naive, like the child in Hans Christian Andersen's famous fairy tale, we may recognize that the emperor actually has no clothes.

SEEKING BROAD OR UNIVERSAL RULES OF JUSTICE AND BEHAVIOR

Any theory of justice that binds a society will depend upon a general agreement among its members on what is "good" or "evil." Justice is ultimately the codification of what, by and large, is considered worthy of being pursued, and of what is considered unworthy and against which prohibitions must be issued.

In spite of the numerous attempts by positivists, naturalists, Marxists, and materialists to equate the "good" with some utilitarian benefit that can be qualified and measured with reasonable accuracy, philosophers remain stubbornly unconvinced. They continue to insist that moral judgments are *a priori* judgments whose validity is grounded in a logic of their own, without experiential evidence. Immanuel Kant (1987) was the most persuasive spokesman of this type of "ethical absolute." This absolutistic argument appeals to the new biologists, who in turn argue that, because ethics evolved like other traits of the species, it must make not only logical but also biological sense.

If previous genetic insights have focused on the genes that make us act like self-assertive and aggressive animals, the new bioethics has emphasized that altruism and empathy are part of humans' genetically fixed repertoire along with dominance, territoriality, and aggressiveness. It is unlikely that altruism—if by that term is meant the investment of some effort for the benefit of others at the expense of the self with no immediate, or at best only delayed, reward in sight—could have been perpetuated unless such altruism—or *ethical skill*, as I prefer to call it—had been part of the genetic inheritance (Hamburgh, 1980a, 1981a).

The shoe is now on the other foot. Altruism, bonding, parental care, pity, and all the social and ethical skills that made the "good life" possible are now seen by many as being part of the genetically fixed human repertoire, and probably of more consequence to human evolution and survival than fighting behavior and self-assertiveness (Hamburgh, 1981a,b).

If, in conformity with Kant (1987), ethical truth can be comprehended by the exercise of (practical) reason, the existence of panhuman or transcultural values that are binding and valid for all members of the human race should also have been observed. This is exactly what sociobiologists (e.g., Wilson, 1975) propose. The injunction against incest is usually cited by them as the most famous example of universal or panhuman values. Anthropologists will be quick to point out that it is much easier to identify transcultural differences than to identify agreements, and they may even find some old out-of-the-way culture where even incest is widely practiced, thus exploding the case for panhuman values.

Neo-Kantian philosophers, in turn, will hold that, although different societies have different moral codes, this fact may prove nothing more than that there is disagreement about moral issues, just as there is disagreement about scientific matters. The fact that some cultures hold our Earth to be flat simply means that these cultures cling to views as erroneous as those held by societies that practice slavery or genocide.

It is interesting that the new breed of biologists in search of a "formula for ethics" find themselves much more attuned to the

rationalism of Immanuel Kant (1987) than to the utilitarianism of John Stuart Mill (1979), with which their predecessors found themselves intellectually more at home.

Concerning Kant, it is well to tread very cautiously. There exists a Kant "industry," whose every member lives for the moment when he or she can point out a technical error in someone else's use of Kant's highly technical terminology.

Kant (1987) claimed that, for any rational being, there is one and only one fundamental principle of morality: "the categorical imperative." According to it, one should always base actions only on those maxims on which everyone else could also base actions without generating contradiction. Kant's injunction—that "Man must never be treated as an object or as a means," but as an end—provides perhaps to this day the most widely accepted moral guidepost.

One may say that the common denominator in the Western concept of justice is the promotion of the human from the state of being an object to which things only happen to that of being an autonomous agent, who can make rational choices. As Reinhold Niebuhr (1988) wrote, "The chief course of human dignity is Man's essential freedom and capacity for self-determination." In turn, the great affronts to justice are those institutions and practices that deny what Niebuhr called "Man's essential dignity and freedom" and that reduce the human being to an object. Thus the practice of slavery is considered the greatest violation to justice because it reduces humans to objects. Slavery is less evil than herding people into cattle cars and driving them across a continent to be choked to death in gas chambers after being nearly starved to death, as was done during the Holocaust, because even the slave was not reduced so totally to the state of an inanimate object or deprived so completely of her or his "essential dignity" as was the Holocaust victim (Hamburg, 1980b).

Nineteenth-century capitalist exploitation, in turn, is considered less evil than slavery because although under the former system laborers were reduced to a commodity, still their opportunity for making choices, though severely restricted, was not

abolished to the same degree as was that of the slave, and their physical conditions were better: they were not beaten and they had a right to immediate self-defense.

THE AMERICAN DEMOCRATIC DILEMMA: UNFAIR TREATMENT OF VICTIMS

"Life," John F. Kennedy (1956) said, "is intrinsically unfair." If that is so, then blunting the inequities of life is a proper concern of "justice." Justice by that definition involves a continuous rescue effort that restores to the victim of life's capriciousness his or her chance for self-dignity.

In Western society, where contractual and commercial relationships guide the use we make of each other, accidents are bound to happen that will obliterate the "essential freedom" of at least some of its members (often all of them). Justice offers a set of "traffic rules" designed to impose limits on the extent of exploitation we practice on one another and to prevent accidents from happening that may lessen or even destroy our freedom.

To create order with freedom is the dilemma that all constitutional governments must resolve. By and large, Western democracy has scored well in the resolution of the ancient conflict between the demands for an efficient government and the demands for justice, together with respect for individual human dignity and freedom, which is the essence of Western justice.

In America, moreover, the old predicament may have been blunted and obscured by a two-hundred-year-old tradition that has conditioned us to "consent not to consent" all the time. The outs have learned to wait until they are in, and the ins are always prepared to be thrown out. This politics of the revolving door has served America well, for it has taught us to accept compromise as a way of life. We have also taken seriously Emerson's advice (1989) that the best government is one that governs least. For most of us, the essence of democracy is still intelligent cooperation, and the tradition of democracy is anchored to that time-honored stop sign

erected at the border of the private preserve across which no government shall trespass.

At the same time, what we want most of our political institutions is a means of protection against the arbitrariness and inequities of life to which we still are exposed in spite of, or possibly because of, the complexities of our civilization. We want our social institutions to blunt life's inequities, not add to them.

If justice is indeed a continuous effort to rescue the victims of life's vicissitudes, why our reluctance to expand this rescue effort to include the victims of crime and injustice? The answer is to be found in our historical heritage. Since the start of our national existence, we Americans have had a deep anxiety about governments' misbehaving and turning despotic.

We have ruled out revenge as a legitimate ingredient of justice, particularly if the state is to be the ultimate arbiter in setting things straight. Our mind has become conditioned to identify emotionally with the accused rather than with the accuser who clamors too loudly for revenge. Revenge is a "no-no" in our catalog of values—unworthy of civilized approval. But revenge balances the equation, and balancing the equation is what Western justice is all about. The idea of an eye for an eye and a tooth for a tooth, although never actually practiced by the ancient Hebrews in the Draconian manner implied by these words, alludes to our moral sensibility, which demands symmetry. Criminals who are not apprehended—or who, when apprehended, are not prosecuted, or who, when prosecuted, are not punished in a manner that fits the crime—introduce an asymmetry into our social order that degrades not only the actual victim but also all of us potential victims. Criminals are not patients; they are debtors, and rehabilitation does not pay the debt. Revenge may not appeal to our highest sensibilities—but neither does it appeal to our lowest ones. It reestablishes symmetry or, as said above, "balances the equation," and without this balance, justice lacks conviction. Conversely, if we take the Kantian (1987) admonition seriously that "Man must never be treated as an object" and accept it as major moral guidepost, then many of the arguments usually marshaled

in the death penalty debate will become irrelevant. Whether, for example, the death penalty is an effective deterrent to crime is not a proper issue in a society devoted to justice: using a person as an example to induce fear in others is about as moral as Nazis shooting hostages to impress the population that sabotage or resistance is expensive.

The only issue on which the pro or con of the death penalty can be argued without violating justice is whether some crimes deserve to be punished by death and whether there is anything in the social-contract theory (Hobbes, 1964; Locke, 1976) that gives to the state the right to take a life and, if so, whether such a provision (expressed or implied) in the social contract "should" have been there in the first place.

I am neither qualified nor inclined to argue these points. All these deliberations merely lead me to the conclusion that examining and discussing victims of crime and injustice may be a test case, as good as any against which to measure or enlarge our concept of justice.

REFERENCES

- Emerson, Ralph Waldo. (1989). *Self-Reliance*. New York: Stewart, Tabori, & Chang.
- Hamburgh, Max. (1980a). "Is Biology Relevant to Ethics, Yet Another Entry into the Sociobiology Debate." *Ethics in Science and Medicine*, 7, 49–56.
- Hamburgh, Max. (1980b). "Is the Holocaust Relevant to Sociobiology?" *Journal of Religion and Health*, 19, 320–325.
- Hamburgh, Max. (1981a). "The Paradox of Human Goodness." *Ethics in Science and Medicine*, 7, 127–139.
- Hamburgh, Max. (1981b). "Paradox of Human Goodness, Reflection on the Article by R. W. Burhoe on 'Religion's Role in Human Evolution.'" *Zygon*, 15, 223–225.
- Hobbes, Thomas. (1964). *Leviathan*. New York: Washington Square Press.
- Kant, Immanuel. (1987). *Fundamental Principles of the Metaphysics of Morals*. Buffalo, NY: Prometheus Books.

- Kennedy, John F. (1956). *Profiles in Courage*. New York: Harper & Brothers.
- Locke, John. (1976). *The Second Treaties of Government*. Indianapolis: Bobbs-Merrill, Library of Liberal Arts.
- Mill, John Stuart. (1979). *Utilitarianism*. Indianapolis: Hackett.
- Niebuhr, Reinhold. (1988). *Man's Nature and His Communities*. Lanham, MD.: University Press of America.
- Wilde, Oscar. (1989). *The Complete Works of Oscar Wilde*. New York: Harper & Row.
- Wilson, Edward O. (1975). *Sociobiology: The New Synthesis*. Cambridge: Harvard University Press.

The Concept of Victimhood

JAMES E. BAYLEY, PH.D.

INTRODUCTION

Among those who suffer loss, it is those we term *victims* for whom we reserve the greatest degree of social concern. But just when is someone a victim and when not? In current loose use of the term, almost anyone can be a "victim" of almost anything, the term being used more as a persuasive device for soliciting aid than as a descriptive. Because it would be worthwhile to know when the term is used descriptively and when only persuasively, I should like to discuss some conditions necessary for victimhood and to examine some putative instances of victimhood in order to distinguish victimhood from other forms of misfortune.

CONDITIONS FOR VICTIMHOOD

People are victims if and only if (1) they have suffered a loss or some significant decrease in well-being unfairly or undeservedly and in such a manner that they were helpless to prevent the loss; (2) the loss has an identifiable cause; and (3) the legal or moral context of the loss entitles the sufferers of the loss to social concern.

Someone who deserves a loss is not a victim, for example, a burglar maimed by a householder. Nor is one a victim who

incurred a loss fairly, as would an open-eyed speculator in the stock market. Victims must be innocent; they must not be guilty of having contributed to their loss.

A loss must have an identifiable cause, as not all concernworthy losses incurred by innocent persons are victimizations. A winning lottery-ticket holder who lost the ticket has suffered a loss but is not a victim. A houseowner whose house is swept away by a flood is a victim.

The concept of victimhood requires that the loss sufferer must not only be acted upon but also be acted upon by an identifiable agent. Caesar, dead from stab wounds, was a victim of assassination. Plato, who died in his sleep, was not a victim. Caesar was acted upon and, moreover, was acted upon by an identifiable cause. Plato was not acted upon; his body just ceased functioning. The houseowner and her house were acted upon by the flood. The ticket holder was not acted upon: he just lacks something. In order for one to be a victim, something or someone must act upon her or him. Bad luck alone does not make a victim.

The third characteristic feature of victimhood, entitlement to social concern, distinguishes victimhood from most other species of loss. To recognize someone as a victim is to recognize that person as morally entitled to concern. The lottery-ticket-holder's loss certainly will provoke sympathy from most people but does not morally require it. Observers who were indifferent rather than sympathetic could not be accused of a morally inappropriate response. They would not be open to the claim that they *ought* to have sympathy. Their callousness would count only as a defect of character, not as a moral impropriety vis-à-vis the ticket loser. But if observers were indifferent rather than sympathetic to the house loser, they could justifiably be accused of moral impropriety. An attitude of sympathy is something they *ought* to have, are morally obliged to have. When others have a moral obligation to one, even if the obligation is no more than that of having a certain attitude, then one is entitled to something, if only the attitude. To say that a victim is entitled to concern is to say that others who know his or her plight are obliged to be concerned.

If a victim must be a victim *of* something, and of something identifiable, the question arises: Is the cause or agent always a victimizer? That is, is it possible for one to be a victim without there being a victimizer? It clearly is. One can be a victim of a natural disaster or of a socioeconomic event, such as an economic recession, and only figuratively could the disaster or the recession be considered a victimizer. Even a human being who is the agent is not always a victimizer. An automobile driver who, swerving in order to avoid one pedestrian, strikes and injures another is an agent of victimization but is not a victimizer.

An agent is a victimizer only when possessed of malevolent intent toward the victim or willful disregard of her or him. The existence of a victimizer is not a necessary correlative to the existence of a victim.

VICTIMS AND PUTATIVE VICTIMS

Let us now consider several kinds of putative victims in order to distinguish those who are indeed victims and thereby properly entitled to concern from those who, although deserving of compassion and even remediation, nevertheless must justify proposals for public aid only on grounds other than victimhood. People are said to be victims of natural disasters, of crime, of poverty, of their environment, and of discrimination, among other things. But each is certainly not a victim in one and the same sense in which the others are.

Keeping in mind that the reason for applying the term *victim* to someone is to identify that person as entitled to concern, we may ask if everyone who suffers loss through natural disaster—say, an earthquake—is a victim. Clearly and paradigmatically, homeowners whose homes are destroyed by an earthquake in an area that has never had an earthquake are victims. Compare them with those homeowners who have knowingly built homes right over the San Andreas Fault, which, geologists had warned them, could slip at any time. When their homes are destroyed by an

earthquake, they cannot be considered victims in the sense in which the non-earthquake-area homeowner is. Aware of risk and accepting that risk, they created their own vulnerability to loss, which excludes them from status as victims. Guilty of folly or of poor judgment, they can seek public aid only in the form of *largess*, not entitlement. They are sufferers, but not victims.

An innocent person accosted by a weapon-wielding robber certainly counts as a victim. But although he or she is no more a victim than is the non-risk-taking earthquake victim, the kind and degree of concern appropriate is or ought to be greater. This is an important difference between the two kinds of victimhood. The earthquake is a natural occurrence that could be neither prevented nor foreseen: the prevention of an earthquake cannot justifiably be considered an obligation of the state. Earthquake victims could not without absurdity claim compensation on the ground that the state failed in its obligation to protect them from it. They cannot justifiably plan their lives on the presupposition that the state has an obligation to prevent earthquakes from occurring. Honest members of society, however, can justifiably plan their lives on the presupposition that the state does have an obligation to deter robberies, and that, when it fails in its obligation, restitution is appropriate, either as compensation to the victim or as punishment to the victimizer, or both. An important difference, then, between natural-disaster victimhood and crime victimhood is that, although the natural-disaster victim is entitled to concern, no obligation exists on the part of specifiable individuals or agencies to supply it (other than, of course, what lawmakers may arbitrarily obligate), whereas in the case of the crime victim an obligation does exist on the part of the state to supply due concern.

In passing, I would like to note that an insight into the relationship between the state and victims of crime can be gleaned from consideration of an anarchic society, in some contemporary conceptions of which (e.g., Nozick, 1974) there would be no victims of crime. Because, in these designedly anarchic societies, protection from assault or loss of possessions would be an individual's own responsibility, any coerced loss suffered would be one

the individual implicitly abetted by failure to protect herself or himself, which abetment would preclude her or him from status as a victim. A necessary feature of victimhood is that a loss be visited on one unfairly or unjustly, and in an anarchic society, absence of law means absence of injustice (if there are no laws, there are no laws that can be violated), and equal vulnerability of people to coerced loss means no unfairness.

This point implies that status as victim, to a large extent, depends upon the context of law and moral rules within which a misfortune occurs. If there are no laws defining certain actions as crimes, then there can be no victims of crime, and if traditional moral rules of truth-telling, promise keeping, and the like do not obtain, then there can be no victims of deception or fraud. A voluntary member of a lawless society, by virtue of such voluntary membership, cooperates in or contributes to losses others may force upon him or her. Only in a law-governed, moral-rule-bound society can individuals become victims by satisfying the requirement of noncontribution to misfortune.

Within law-governed societies, context determines victimhood. Consider two people who have received injuries as a result of assault by a third person, a robber. One of the two is an honest man on an innocent errand, who was waylaid by the robber. He, all would agree, is a victim. The other is a police officer who came to the man's aid. She is not a victim. By voluntarily incurring the risk of assault by virtue of membership in a police force, she no longer satisfies victimhood's requirement of noncontribution to misfortune. She may deserve recognition of selfless performance of dangerous duty and certainly warrants regret that she suffered injuries, but she may not lay claim to the kind of concern due victims.

Nor may another civilian injured coming to the aid of the victim lay claim to the concern due victims. He would appear also to be a victim because, unlike the police officer, he does not incur risk for pay. But he differs from the first civilian in that he voluntarily exposed himself to risk; that is, he contributed to his misfortune. To be sure, most people's intuitive judgment would be

that he is as much a victim as the first civilian, but unless the term *victim* is to apply to all cases of misfortune, he is not a victim. He is a hero deserving of honor for valor and of compassion for injury, but he is not someone *entitled* to social concern, at least not as a victim. When loss sufferers are indiscriminately called victims, meaningful differences among situations and events are lost, and this loss in turn entails loss of appropriate response; praise, blame, reward, pity, aid, concern, and indifference are differentially appropriate to victims, heroes, duty performers, self-sacrificers, and various other self-contributing loss sufferers. An injured hero is praiseworthy, not pitiable. A victim is pitiable. Each should get the appropriate response.

There is another side to the indiscriminate use of the term *victim*. People repeatedly called victims usually think of themselves as victims, that is, as pitiable, hapless, and disempowered. They can become what they are said to be. A rueful irony of recognition that some groups are victims of social injustice is that self-perception and other-perception of their victimhood work to perpetuate that very victimhood. Paradoxically, an effective response to some victims might be not to perceive them as victims.

ROBBERS: VICTIMS OF ENVIRONMENT?

Is the robber a victim? Just as the honest person is a victim of assault by the criminal, is not the criminal a victim of his or her environment?

The term *victim* is misused when used of a criminal, or at least, of most criminals. Exclude from consideration those clearly insane and those who commit minor crimes under duress, such as parents stealing food for their children. These are special cases. Consider only street criminals who rob rather than work, or who rob because they cannot find work. They satisfy none of the three necessary features of victimhood: loss incurred helplessly and unfairly or unjustly; attributable cause; and entitlement to concern.

Of the first feature (helpless, unjust loss), if by "victimizing environment" is meant economically impoverished environment, then about the only form unjust loss could take is unavailability of opportunity. If this is so (i.e., if unjust loss is taken to mean unavailability of opportunity) then, in order for criminals to be considered victims, they would have to have lacked the opportunity as children to become honest adults. But it is simply false to claim that they lacked the opportunity because almost all of their similarly impoverished neighbors became honest adults.

Either it is false to claim that because of a "victimizing environment" criminals lacked the opportunity to become honest adults, or "environment" has to be construed as a microenvironment, that is, as those features of the environment so specific as to be unique to the criminal. If the latter is the case, then the claim that the criminal is a victim of his or her environment is the claim that the criminal is a victim of his or her personal microenvironment.

But if personal microenvironment is the claim, then either of two alternatives must hold. Either (1) each and every criminal, upon examination, will turn out to have suffered an overpoweringly malign microenvironment, which *would* count as an unjust lack of opportunity, but which is unlikely to the point of implausibility when claimed, as it must be, of every criminal, or (2) *every* person, whether criminal or not, is a product of a microenvironment, either benign or malign, in which case *everyone* is acted upon, and *everyone* is a helpless product of an environment. And if everyone is a helpless product of an environment, then a necessary feature for distinguishing victims from nonvictims no longer exists, and the concept of *victim* becomes meaningless. In short, the claim that each and every criminal who robs for profit is a victim of a personal microenvironment either is implausible or empties the term *victim* of meaning.

Suppose, on the other hand, that it is plausible that every criminal has suffered an overpoweringly malign microenvironment, of which he or she is a victim. In such a case, victims could outnumber nonvictims, and because the point of calling a criminal

a victim is to relieve him or her of full accountability, only good people will be fully accountable. This is so because criminals are distinguishable from many other wrongdoers only by happenstance of what is prohibited by a criminal code and not by possession of a unique set of "criminal" traits. Those who commit acts of malice, exploitation, deceit, and the like, not prohibited by a criminal code, are as inclined to wrongful acts as those who rob. They, too, would have to be considered victims of microenvironments and, as such, could not be held fully accountable. In short, claim that criminals are victims and you will have to claim that almost *all* wrongdoers are victims, with the implication that only consistent rightdoers are accountable for their occasional wrongdoings.

The criminal as alleged victim also lacks the second necessary victimhood feature of identifiable cause. Of exactly what is he or she a victim? The homeowner is a victim of an earthquake. The waylaid pedestrian is a victim of robbery. The injured person is a victim of an automobile accident. Of what are criminals victims? The answer that they are victims of their environment is not a sufficient answer, if only for the reason given just above, and also for the reason that an "environment" does not act upon a helpless person the same way an earthquake, an armed robber, or a speeding automobile does. What *bad environment* ultimately must mean is an environment that offers a different range of choices or opportunities—in short, more opportunities for criminal behavior—than a "good" environment offers. But a range of opportunities is not an agent acting upon a helpless person. It limits, thwarts, or frustrates, but it does not overpower or compel in the same way an earthquake or an aimed weapon does.

Calling criminals victims of their environment undoubtedly is an effective persuasive device. Once they are perceived as victims, they become objects of concern and become entitled to aid and remedy. They may very well be entitled to aid and remedy, but not because they are victims and certainly not in the unconditional form appropriate to victims. They are entitled to concern because they have mismanaged their lives, because they have lost their

way. They are entitled, morally entitled, on the grounds of decency and humanity, to exactly what any lost traveler is entitled to: directions to the right road. But if they are perceived as victims, then, because their environment—unlike earthquakes, robbers and automobiles—is forever acting on them and they are therefore forever helpless, they must also be perceived as incapable of self-management of their lives and must be treated as something less than rational, adult human beings, and as incapable of keeping to the right road.

VICTIMS OF RACIAL DISCRIMINATION

People unquestionably are victims of racial discrimination. When they are, they are entitled to concern. Concern might be only the removal of a cause of loss, such as an unequal application of voting laws, or it might be something more, but it is a question beyond the scope of this chapter. What I would like to note here is that in assessing victimization we ought not confuse racial discrimination with bad environment. All sorts of groups and ethnicities live in bad environments, but only certain groups or ethnicities become targeted as objects of unjust practices, and the members of targeted groups need not and in fact do not always live in bad environments.

But even if African-Americans, for example, and members of other groups are properly considered victims, it is only within limits. Victims are helpless; if they are not helpless, they are not victims. It is absurd to think that every African-American, because he or she is African-American, is helpless. Not only is it false, but it also fosters in those who perceive African-Americans as victims a morally odious form of paternalism. Specific persons are victims of specific practices: denial of voting rights in Place X; exclusion from jobs, although qualified, in Place Y. These persons cease being victims when the specific practices cease. It is false to the meaning of victimhood to take the entire array of ills visited upon African-Americans by bigoted people as victimization.

Slight, indignities, and rudenesses fall on everyone. They are part of life. But their occurrence does not always constitute victimization, no more with African-Americans than with members of other groups.

CONCLUSION

In many cases of misfortune, no important consideration suggests the withholding of attitudes appropriate to victims. Compassion and desire to aid are more important than a sufferer's classification. In some cases, however, important considerations do suggest that sufferers not be viewed as victims. In the network of obligations and priorities that communities and societies have in regard to sufferers, status as victim occupies a special place. It gives priority of concern to certain sufferers over others. If, because of zeal to render aid, we view certain sufferers as victims, we risk paternalistic devaluation of them from self-managing people to dependent, hapless people. We risk causing them to be victims by viewing them as victims.

REFERENCES

Nozick, R. (1974). *Anarchy, State, and Utopia*. New York: Basic Books.

Crime

Crimes of which a people is ashamed constitute its real history.

JEAN GENET (1910–1986)

Crime expands to fill our willingness to put up with it.

BARRY FARBER (b. 1930)

The good of the people is the chief law.

MARCUS TULLIUS CICERO (106–43 B.C.)

It is better to prevent crimes than to punish them.

CESARE BONESANA, MARCHESE DI BECCARIA (1734–1794)

A. Victims and Society

My object all sublime, I shall achieve in time—To let the
punishment fit the crime.

WILLIAM S. GILBERT (1836–1911)

Only a socially just country has the right to exist.

POPE JOHN PAUL II (b. 1920)

Unless a peaceful revolution is possible, a violent revolution
will occur.

JOHN F. KENNEDY (1917–1963)

Only an equal society can save a victim from being the
victim.

GLORIA STEINEM (b. 1934)

Victim Compensation

The Joint Responsibility of the Criminal and Society— A Social-Contract Approach

RODOLPHE J. A. DE SEIFE, J.D.

INTRODUCTION

Hardly a day goes by without newspaper reports of major violent crimes committed in all settings—from the largest metropolitan area to the smallest hamlet, from the poorest ghetto to the most affluent neighborhood.¹ The cost of crime to society, including so-called white-collar crimes, is so staggering today that it can no longer be tolerated if we are to survive as a free and civilized society. Crime is both economically and psychologically taxing, and economists can come up with figures on the economic costs of crime that boggle the imagination.² Today's dilemma is to reduce crime and make it unprofitable without destroying our free society.

The psychological and economic costs of crime have reached intolerable levels in the United States. Yet criminals of all kinds escape the economic consequences of their crimes. Through their representatives, whether paid mouthpieces or merely well-inten-

tioned compassionate do-gooders, criminals have persuaded society to bear all of the burden of crime, to speculate on the motivations of the criminal, and to spend an inordinate amount of its resources on "rehabilitating" criminals.³ Now comes a move for compensating victims of crime⁴—a commendable effort in the right direction, in the author's opinion.

Many rationales exist for crime victim compensation. A particularly cogent basis for such compensation is the concept of a social contract. This approach may not be novel, but it is worth considering, particularly if the criminal is to be made to pay if not all, at least a fair proportionate part, of the costs of his or her actions.

In this approach, society has a contract with each of its members, and the members, with one another. The criminal is liable for damages to his or her victim to whatever extent necessary to render that victim "whole." The criminal must be made to pay this debt to the victim to the extent practicable, either concurrently with or subsequent to paying his or her "debt to society."

By contrast, the current jurisprudential approach of separating the interests of the victim from those of society is unrealistic. That separation, too, is a legacy of the past. As time progressed in the Middle Ages, monarchs became more interested in crime as a disturbance of their peace, and the properly paramount role of the victim was muted. Now that our society has achieved a more sophisticated sense of "freedom" and "democracy," such an approach ought to be reexamined and discarded in favor of a more rational and equitable system.

The "social-contract theory" provides a sensible and workable legal framework for establishing the liability of criminals to their victims and thus for helping effectuate a better society.

THE SOCIAL CONTRACT AND THE RIGHTS AND RESPONSIBILITIES OF ALL INVOLVED IN THE SOCIETAL SYSTEM

It is logical to view society as having social contract in effect between it and its members, and consequently among the mem-

bers themselves. This theory is not novel, but from a legal viewpoint, it is one worth stressing regardless of its lack of currency in other areas of social science.

The U.S. Constitution can be viewed as a contract between the people and those they elect to represent and govern them. According to the Constitution, whatever the people have not given to the government they have retained. Until our form of government is formally changed, it is not the government that gives any power to the people. Rather it is the people who give the government enumerated powers to do the popular will as expressed by their elected legislators.

Each individual, as a member of "We, the People," can be viewed as entering into a contract with every other individual of "We, the People" to do certain things, not to do some other things, and generally to accept some limitations on their original, complete individual "sovereignty" in exchange for certain benefits. Assuming that one of the ultimate aims of a civilized society is the eventual eradication of violence, living in such a society means that one's freedom to do anything one pleases ends where another individual's perimeter of freedom starts. By giving up the right to resort to violence and physical force to resolve one's claims, each individual acts on the premise that a peaceful and orderly approach to dispute resolution is preferable to the exercise of raw power. "Sovereignty," in the restricted sense of unaccountability, is the antithesis of the peaceful and orderly societal behavior of the individual; accountability of the individual is the very foundation of our democratic form of government.

As soon as an individual becomes a fully participating member of society, he or she enters by implication into an agreement with that society to behave in such a fashion as not to hurt or damage any of its other members. Each individual agrees that he or she will not intentionally engage in antisocial behavior. Going one step further, each individual pledges not to be so unmindful or careless as to abridge another's rights, whether unintentionally or intentionally. Therein lies the distinction between tortious⁵ and criminal activities. Crime, generally, is intentional⁶; a tort may be intentional or unintentional. "Criminal" activity within the social

contract is thus included in tortious conduct. Therefore, when one breaches this social contract by committing a criminal act, one is also liable in tort (i.e., liable for damages in a civil suit). Interestingly, civil law jurisdictions (e.g., Continental European countries like France) do not treat a tort qualitatively differently from criminal activity in terms of liability for damages.

Each individual is bound, through the social contract, to all other members of society. This contract imposes on the individual a set of duties owed to the society. The society (i.e., group of individuals) reciprocally undertakes to do certain things in exchange for the commitment from each individual. It pledges to protect every individual against encroachment on her or his rights by other individuals in the society. Although a crime is an offense against society or the state, to deny the legitimate interests and claims of the victim misses the whole point of the social contract.

Under the social-contract theory, society must see to it that the rules established by the individuals who compose it—acting through their elected representatives—are obeyed by all. In case of any breach of this contract, society is obligated to force maximum restitution by the offender and to guarantee the making whole of the victim, by compensation or otherwise. This societal guarantee is implicit in the social contract and leads to the conclusion that it is society's duty to see to it that restitution, compensation, or restoration is effectuated, primarily by the criminal, as it is by the negligent.

The reason for this approach to crime victim compensation is obvious. The economic burden of crime should be shared by all who make up society for the society's failure to live up to its end of the bargain, that is, for its failure to prevent crime or its inability to make the criminal pay for the crime. If we invoke an analogy to basic insurance concepts, it is easier and more suitable that the burden be borne not by the crime victim but by the criminal; and in the event of the latter's inability to restore the victim to his or her integrity, this liability should be shared by all members of society. Otherwise we continue the current process of

the systematic economic crushing of innocent victims, as society turns its back on the rights of the victim as an individual.

Society establishes police forces to enforce the rules adopted by the people through their elected representatives. The role of the police is to deter crime, to detect criminal activity, and to apprehend criminals. Once these duties are done, the judicial system takes over. Legislation, the voice of the people, adopts the rules or laws. Judges are to apply these rules to decide whether a certain activity falls within the prohibitions of the law. An individual who is convicted is punished and then is viewed as having paid her or his "debt to society." But what about her or his "debt" to the victim? How can this peculiar process be called justice? Society must therefore see to it, at the very least, that the criminal pays his or her debt to the victim.

VICTIM COMPENSATION AS A WAY OF ALLEVIATING THE EVILS OF CRIME

There are many reasons, besides the much publicized oversolicitous attitude of too many courts to "protect" the rights of criminals, why our present-day criminal system is miserably failing, giving the public the dangerous idea that "crime does pay" today.

At present our criminal justice system is deficient and unjust because, if and when it punishes a convicted individual for a crime, it does not require that this individual also pay his or her debt to the victim. Thus, insofar as the victim is concerned, the criminal "gets away with murder" even where society may have slapped his or her wrist with a sentence to a "lifetime" in jail (which in practice means seven years). This scenario assumes, of course, that the murderer has not bargained his or her way down to a misdemeanor.

By not compelling criminals to undo the damage they cause, we are making a mockery of legal institutions and causing untold

harm to the innocent victims, whose main problem is that they, but not the criminals, have observed the terms of their social contract. The whole economic burden of crime rests on the shoulders of the victims, and such an unconscionable situation has been created that it has shocked many good people into trying to remedy the situation by creating "victim compensation laws." Such laws, despite good intentions, do not accomplish what their authors set out to do unless the victims receive "full" compensation and the criminals are made to shoulder the maximum share of restitution. Some of these compensation laws may thus add an unnecessary economic burden on society and the victim if they remove the economic consequences of crime from the criminal's back.

To date, the overwhelming majority of states have some form of recently enacted crime-victim-compensation law on the statute books. Efforts to place the economic burden on the shoulders of society can be broadly based on the theory that the government (i.e., society) has breached its duty to the victimized individual in not having prevented the crime. A more attractive theory is based on the concept of insurance, where the salient point is that the victim should not be alone in bearing the economic burden of the crime. Rather, the victim, under the social-contract theory, is entitled to compensation—but compensation first from the criminal. To that end, society must first attempt to use its full power to make the criminal pay her or his debt to the victim. Further, where such an attempt fails or is not feasible, the victim is entitled to compensation from the state in those cases where the state is unable or unwilling to make the criminal pay. In any such considerations, it should be remembered that the main thrust of the social contract is that individuals will not abridge the rights of other individuals, whether by crimes of violence or economic crimes.

The distinction between crimes of violence and economic crimes is an important one from both the penological and the damages viewpoints. Obviously, much could be achieved in terms of the cost of crime if economic crimes were severely punished

both economically and with criminal punishment, that is, incarceration reduced to a minimum and maintained primarily for symbolic reasons. Crimes of violence, on the other hand, deserve punishment that is swift and harsh, but that at the same time is reasonably tailored so as not to defeat the victim's rights to compensation.

One can suggest only guidelines for the social policy involved in "making the punishment fit the crime." Obviously, if society decides that the punishment for murder is death, then it will have to shoulder entirely the burden of compensating the victim, subject to the forfeiture of whatever assets the criminal may have.

Restitution is supposed to have a rehabilitative effect (in addition to the punitive aspect of imprisonment and/or a fine) in that it makes the offender more conscious of his or her responsibility. With the exception of capital crimes, imprisonment for other crimes should be realistically brief, as long as the experience of incarceration is distasteful enough to discourage recidivism (inordinately high percentages of former prison inmates return to a life in crime). This reform must be coupled with realistic opportunities for the ex-criminal to find gainful employment after serving his or her time. Only then can the indigent criminal be forced to pay for at least part of the cost of his or her criminal activity (as we no longer condone involuntary servitude for private purposes).

The goals contemplated for a victim compensation scheme in which the criminal is to pay for the cost of the crime may appear to be contradictory. However, these contradictions are not irreconcilable within the framework of the political process involved in adopting appropriate enabling legislation.

Insofar as "judgment-proof" criminals are concerned, there is nothing particularly shocking in the notion that coerced labor as part of the sentencing process may offer a viable solution. The court could, as part of the sentence, order the criminal to work from a "halfway" house and, after room and board costs are paid, turn over the balance, if any, of her or his earnings to a compensation fund. Such earnings would be transferred into the fund until a stated amount is reached, to be determined by the court

(guided by legislation), taking into account the circumstances of each case.

SOCIETY AS A GUARANTOR OF THE SOCIAL CONTRACT

As victims have rights arising from the social contract, rights vis-à-vis both the perpetrator of the crime and society, so do criminals have duties and liabilities to the victim and society. They must pay their debt to society and to the individual. Today, however, we pay much attention to the repayment of the "debt to society" and comparatively little to the debt to the individual, even though the former debt clearly seems the less important of the two. Although society should see to it that crimes are punished by making criminals pay a "debt to society," it is more important that criminals be made to pay their debt to their victims. Criminals should pay for the economic damage done both to society and to their victims. These remedies and liabilities are not mutually exclusive.

In the area of repairing damages to the victim, the state (or society) stands by as an insurer, on the theory that the state should not have "allowed" the crime to occur in the first place, and on the insurance theory that the economic burden, caused by a situation that is not of one's making, should be shared by all, so as to make it more bearable by the individual victimized by the criminal.

HANDLING THE CRIME PROBLEM AT ITS ROOTS

The social policy suggestions below are not comprehensive, nor does the order of their listing indicate any ranking by importance. They are merely broad policy considerations of problem areas involved in the implementation of a forward-looking anti-crime reform that considers the crime victims' rights on a par with those of the criminal and society.⁷

1. The exclusionary rules of evidence⁸ should be discarded. A major justification for the rules is the perception that, if police and prosecutors are left to their own devices, they will use any method, legal or illegal, to secure evidence to make their case. To discourage police and prosecutorial lawlessness, the U.S. Supreme Court decided to render "illegally" obtained evidence inadmissible at trial. The impact on society is altogether ignored in this approach, and the assumption seems to be that the only protagonists in a criminal case are the criminals and the "authorities." We are the only nation (Britain holds confessions outside the courtroom to be inadmissible) that has this peculiar approach of punishing society for the unauthorized activities of its agents. Evidence is neutral and should be received for its probative value regardless of how obtained. To protect against overreaching by the state, the rights against self-incrimination should be construed so as to render confessions inadmissible, except when made in open court. Police or prosecutors who violate the rights of individuals should be punished separately. Immunity for police or prosecutors is a short-sighted, undemocratic concept that must be done away with because accountability at all levels is the foundation of democracy and equality under the laws on which our society is based. Victims of police brutality are entitled to compensation from those who violated their rights.

2. Amend the federal, as well as the state, Rules of Civil and Criminal Procedure so as to dispose of the civil and criminal phases of all cases at the same time, bearing in mind that because of the stricter standard of proof ("beyond all reasonable doubt") required in criminal trials, an acquittal on a criminal charge may not necessarily entail lack of civil liability.

The "civil" liability aspect of the trial need not necessarily be considered by the jury. The judge should be able to determine that aspect of the case. As a result, the jury would not be faced with the psychologically difficult decision of separating criminal from civil "punishment." The Seventh Amendment to the Constitution, granting the right to a jury in federal civil trials, does not apply to state courts.⁹ It would appear that, where necessary, state consti-

tutional amendments should be implemented to achieve this result.

Thus, in cases where, for technical or other various reasons, a jury may acquit an individual, the latter remains civilly liable to the victim—which is the way it should be in a system that prides itself on dispensing “fair” justice.

3. Punishment for criminal acts ought to be tailored to restitution and rendering the victim “whole,” without necessarily giving up the necessary symbolic punishment for purposes of deterrence and ensuring that no one will be able to “buy” his or her way out of a crime.

4. Make parents, or those *in loco parentis* (in the place of a parent), responsible for the acts of their children. No convincing reason is advanced to support the present system, in which crimes by children remain without redress and without regard to the child’s age. This is not to say that criminal punishment in the case of minors should not function on a different level from that involving adults.

5. Redefine the definition of *minor* for purposes of criminal acts and civil liability. Thus, minors over fourteen or fifteen should be made criminally liable for their actions, and criminal liability would be optional and tailored to the specific situation in cases of children between ten and fourteen. Infants under ten would remain beyond the reach of criminal sanction. However, civil liability should attach during the individual’s minority (preferably to age eighteen or twenty-one, or as long as he or she is a dependent). The parents still would have to perform on behalf of their child, including in the case of nonprosecutable acts because of the child’s infancy.

6. A rational handgun and “assault” weapon control or registration law should be adopted and implemented at the national level. Only a uniform nationwide control of the possession of handguns and assault weapons (i.e., large-ammunition-capacity semi-automatic rifles) can work. It would seem unnecessary to point out that there is no reason for citizens in a civilized society to carry handguns or assault weapons if, indeed, society is to take

over the policing of violence. Free possession of handguns symbolizes at least a tolerant view of the resort to violence—the very same evil we are trying to eradicate. Handguns, assault weapons, or bazookas are not hunting weapons; they have only one purpose: killing another human being. As defensive weapons against criminals, handguns in the hands of most civilians are less than effective if stored in such a way as to prevent accidental firing by unauthorized persons (e.g., children). If an individual needs a handgun for a particular purpose, a registration requirement, assuming that he or she has obtained a license to own firearms, seems reasonable. It is difficult to comprehend that a society that accepts the licensing of motorists along with vehicle registration reacts so emotionally to any suggestion of the effective registration of handguns and assault weapons and the licensing of individuals wishing to own such guns.¹⁰

Any handgun-control law should ensure the preservation of the legitimate rights of gun collectors, hunters, and others who feel they must keep or carry such weapons for self-defense. By the same token, such legislation should make it an offense to own a handgun or an assault weapon without a proper license and registration and should provide for a substantial increase of the penalty when the gun is used in the pursuit of a criminal activity.¹¹

7. Glamorizing violence must be controlled, if not stopped. There is no cogent support for the proposition to ban sex-oriented shows from television and permit the detailed description of gore and violence for impressionable children to watch and imitate. The X rating of movies (whether for screen or television) should be extended to shows depicting violence and bloodletting, which often either make heroes out of individuals who take the law into their own hands or, even worse, transform criminals into role models or objects of sympathy. There is nothing constitutionally incompatible with this suggestion: society has a legitimate interest in protecting its young.¹²

8. It appears reasonable and useful to keep centralized files and information on individuals guilty of crimes. Commercial credit-rating bureaus have an elaborate system with respect to the

economic viability of individuals. Can we expect less where criminals are involved? It would seem that, under the social-contract theory, a convicted criminal forfeits, at least to that limited extent, his or her right to privacy.

9. We must reorganize and streamline the police forces according to guidelines that would increase their efficiency and reduce their operating costs. Thus state police should have primary, if not exclusive, jurisdiction over felonies, and municipal and county police should control primarily misdemeanors and refer felonious crimes to the state police. The present duplication of the costly sophisticated scientific equipment required by police authorities and the multiplicity of jurisdictions, with their consequent conflicts, are extremely wasteful and make it difficult to have a cohesive approach to the fight against crime.

10. Prisons should be spartan centers where convicted criminals perform productive work in order to pay, at least partially, for the costs of their crimes, including the cost to society of prosecuting and incarcerating them. Where prisoners have other sources of income (e.g., publication royalties and inheritances) that income should be applied toward these costs. A criminal's assets should be forfeited to the extent necessary to undo the harm that he or she has done.

11. Prison sentences should be relatively brief, depending upon the nature of the crime. We ought to reexamine our present criminal statutes with a view to decriminalizing certain consensual activities that offend primarily sexual moral standards, to abolishing criminal laws that are or cannot be enforced so as to minimize selective prosecution based on motives other than public order, and to controlling our propensity to overcriminalize every statutory transgression. The present system of sentencing should be revised so that the actual time served corresponds to the sentence, with, possibly, some minimal credit for good behavior.

12. We should abolish the present parole system and replace it with a monitoring scheme to ensure that criminals who have served their time honor their commitment to compensate their victims. Criminals should not be regarded as having "paid their

debt to society" until they have repaid (at least to their ability) their victims. To that end, society will have to help ex-felons to find gainful employment.

13. As a society we may have to reassess our value system to the extent that those who, through no fault of their own, have to depend on welfare should have a minimum standard of living slightly higher than that offered the prison population; in turn, those on welfare should expect fewer amenities than the "working poor." It is a matter of the survival of our system to ensure minimum dignity and decent living conditions to those who are poor but remain law-abiding, superior to the conditions we expect to govern the prison inmates. A return to an appreciation of the fundamental virtues of compassion and the dignity of work, and of the correlation between "rights" and "responsibilities," would help eradicate our contemporary "what's-in-it-for-me" oriented society. More often than not, the poor constitute the largest number of crime victims. Poverty does not excuse criminal activity (unless, arguably, the crime is directed solely toward property and constitutes the only way to survive). Most poor people try to lead decent lives without resorting to crime. It is time to appreciate this fact and to reorder our priorities accordingly. Surely the most honest and law-abiding disadvantaged members of our society deserve our support, in terms of tax dollars, more than the criminals.

Certain basic values that are, by consensus, adopted in a pluralistic society are necessary for its survival and must be adhered to.¹³ Our Founding Fathers strongly felt that government had a role to play in promoting the general welfare of its citizens¹⁴; two centuries later, it is still a good thing to remember.

CONCLUSION

In a free and democratic society, the art is to find the proper balance between conflicting rights, without succumbing to the tempting notion that the individual victim has less value than the

group. Anarchy—individuals acting without having to account for their actions under the norms adopted by society—leads to the breakup of societal rights and obligations. By the same token, elevating unbridled greed to the rank of a national virtue and approving a philosophy that the end justifies the means are equally destructive of a democratic society. The present course of self-centered demagoguery by the few, if unchecked, will destroy both freedom and democracy in our nation.

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NOTES

1. According to the U.S. Bureau of the Census (1980), there were 1,189,000 violent crimes (murder, rape, robbery, and aggravated assault) in 1979 in the United States, an 11.3 percent increase from the previous year. Another 11.3 percent increase in 1980 brought the number to 1,323,000. Violent crimes increased again in 1981 by 1.3 percent to 1,341,000, then declined slightly by 2.9 percent to 1,302,000 in 1982; but by 1986 it increased to 1,488,000 violent crimes (according to the Federal Bureau of Investigation's Uniform Crime Reports data, as reported by the U.S. Bureau of the Census, 1988), altogether an unacceptable number in a self-proclaimed "civilized" country. From 1979 through 1986, there was an increase of 44.5 percent in the rate of violent crimes.
2. Edward H. Sutherland, in *White Collar Crime* (1967), indicates that although white-collar crimes are not documented in such census studies, their financial cost is probably twice that of the other crimes.

Incorporated in the U.S. Bureau of the Census statistics are the public expenditures for crime prevention at all governmental levels. In 1978, \$24 billion was spent on crime prevention alone. This statistic represents only police, judicial, legal services, public defense, and corrections. In 1982, this cost reached \$24.945 billion, zooming to \$48.5 billion in 1985. The U.S. Bureau of Criminal Justice Statistics

(1989) figures for 1988 soared to \$60.98 billion spent on federal, state, and local civil and criminal justice activities.

Former Chief Justice Warren E. Burger of the U.S. Supreme Court, in the August 1981 issue of the *American Bar Association Journal*, estimated that the annual cost of criminal activity in the United States then was well over \$100 billion (p. 988). This estimate included the direct loss by the victim, increased insurance rates, and increased security costs to homeowners. One estimate, based on other information supplied by the U.S. Bureau of the Census (1985), put the cost of criminal activity at \$174 billion in 1985.

If Sutherland's estimate is correct, then we may add another \$300 billion or more annually for white-collar crimes, for a grand total exceeding \$500 billion.

3. According to various sources, in 1982 it cost between \$12,200 and \$22,000 a year to keep a single convicted felon in jail. The 1986 yearly cost was \$13,162 for one *federal* prisoner. The cost of keeping one juvenile offender in custody was stated to be \$25,200 a year in 1985. "It would be cheaper to send him to Harvard," one television commentator quipped. Some recent data indicate that \$35,000 is spent annually per criminal in jail. Mayor Edward Koch of New York estimated the cost of building one prison cell at \$100,000. However, a more realistic recent estimate sets the construction costs at \$50,000 per cell because of improved prison construction methods. Annual expenditures for building prisons across the nation amount to over \$4.4 billion, of which more than \$2.5 billion is expended at the state level. How much, in contrast, is spent to build decent housing for the homeless?
4. All states except Maine and South Dakota (the latter's program begins July 1, 1992) now provide for some compensation to victims of crimes. The widespread enactment of such programs is partly attributable to the Federal Victims of Crime Act of 1984 (Title 42 of the U.S. Code, Section 10601, *et seq.*), which provides matching funds of up to 35 percent of state disbursements to qualified state programs. Additional data concerning victim compensation awards culled from the U.S. Bureau of Criminal Justice Statistics (1984) set the average victim compensation award at \$3,000 and the average maximum award at \$18,000. Most states have compensation awards to "Good Samaritans."

Coverage provided by most state victim-compensation plans

extends only to economic losses resulting from personal injuries, including medical expenses, and from lost wages or loss of support and burial expenses. Exceptions or additions to these benefits are indicated in the "Comments" column in the following table.

| State | Maximum award limits | Comments |
|-------------------------|-------------------------|---|
| Alabama | \$10,000 | For economic loss in excess of collateral source of recovery, i.e. insurance. |
| Alaska | \$50,000 | For death by violent crime only; restitution available. |
| Arizona | \$10,000 | |
| Arkansas | \$10,000 | Revolving restitution fund. |
| California | \$23,000 | Recovery for property damage caused by police. |
| Colorado | \$10,000 | Residential property damage up to \$250. |
| Connecticut | \$10,000 | |
| Delaware | \$10,000 | |
| District of Columbia | \$25,000 | Must show financial need. |
| Florida | \$10,000 | Must show financial need. |
| Georgia | \$1,000 | \$5,000 recovery for "Good Samaritans." |
| Hawaii | \$10,000 | Pain and suffering compensated. |
| Idaho | \$20,000 | Program to end June 30, 1991 (unless renewed). |
| Illinois | \$15,000 | Minimum \$200 claim. |
| Indiana | \$10,000 | |
| Iowa | \$23,000 | |
| Kansas | \$10,000 | Must show financial need. |
| Kentucky | \$15,000 | Must show financial need. |
| Louisiana | \$10,000 | Loss of abode compensated. |
| Maine | | No compensation; restitution remedy only. |
| Maryland | \$45,000 | Award follows workers' compensation schedule. Must show financial need. |
| Massachusetts | \$10,000 | |
| Michigan | \$15,000 | Must show financial need. |
| Minnesota | \$25,000 | |
| Mississippi | \$10,000 | Minimum loss of \$100, exception over age 65. |
| Missouri | \$10,000 | |

| State | Maximum award limits | Comments |
|----------------|-------------------------|--|
| Montana | \$25,000 | |
| Nebraska | \$10,000 | Must show financial need. |
| Nevada | \$15,000 | Must show financial need. |
| New Hampshire | \$5,000 | Personal injury caused by felony or drunk driving only; \$100 minimum. |
| New Jersey | \$25,000 | |
| New Mexico | \$12,500 | |
| New York | \$20,000 | Unlimited medical expenses; seniors' property up to \$500; "Good Samaritan" up to \$5,000. Must show financial need. |
| North Carolina | \$20,000 | |
| North Dakota | \$25,000 | |
| Ohio | \$25,000 | |
| Oklahoma | \$10,000 | |
| Oregon | \$23,000 | |
| Pennsylvania | \$25,000 | |
| Rhode Island | \$25,000 | Pain and suffering compensated. |
| South Carolina | \$10,000 | |
| South Dakota | \$10,000 | Program begins July 1, 1992. |
| Tennessee | \$10,000 | Pain and suffering; up to \$2,500 for rape victim. |
| Texas | \$25,000 | |
| Utah | \$50,000 | No minimum loss required. |
| Vermont | \$10,000 | No minimum loss required. |
| Virginia | \$12,500 | |
| Washington | \$15,000 | |
| West Virginia | \$20,000 | |
| Wisconsin | \$10,000 | |
| Wyoming | \$10,000 | |

5. A tort is an injury resulting from the violation of a duty imposed by general law. The duty owed arises not from a contract but by operation of the law. An intentional tort is more serious and condemnable than an unintentional tort (i.e., an accident). There is a civil law nexus between tort behavior and criminal (or quasi-criminal) behavior: conceptually the civil law offense encompasses tortious as well as criminal conduct. In this context, a crime may be defined broadly as a tort committed with "evil" intent.

6. Certain nonintentional actions may be declared by legislation to be criminal (i.e., they are statutory crimes).
7. These policy suggestions were made at a 1981 Colloquium at Pace University in New York. They are still timely.
8. These are court-created rules that do not permit the introduction in court by the prosecution of "illegally" obtained evidence (e.g., in violation of the accused's constitutional rights). These rules are currently becoming circumscribed by a host of exceptions.
9. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916), *Melancon v. McKeithen*, 345 F.Supp. 105 (D.C.F.D.La.), *aff'd per curiam*, 409 U.S. 943 (1972), and *Alexander v. Virginia*, 413 U.S. 836 (1973).
10. Based on statistics in the *Journal of the American Medical Association* (reported in *Newsweek*, July 9, 1990, p. 7), the United States "leads the industrialized world in homicides. Three-fourths of all U.S. murders are committed with guns as compared with one-fourth overseas. Here's the U.S. homicide rate compared with some selected countries

| Country | Killings per 100,000 persons | Country | Killings per 100,000 persons |
|---------------|---------------------------------|--------------|---------------------------------|
| United States | 21.9 | Poland | 1.2 |
| Scotland | 5.0 | England | 1.2 |
| Israel | 3.7 | West Germany | 1.0 |
| Sweden | 2.3 | Japan | 0.5 |
| France | 1.4 | Austria | 0.3" |

The most recent figures amply demonstrate the fallacy of simplistic slogans such as "Guns do not kill people, people kill people." It would seem that easy access to guns is a major factor in U.S. homicides, combined with an increasing absence of civil values and callousness toward the value of human life and property.

11. The latest appeal for strong gun control has come from the President of the American Bar Association, L. Stanley Chauvin, Jr. (1990). One would think that the overwhelming majority of people would agree that the possession of assault weapons is not sacred. Why should assault-rifle-wielding individuals be considered "sportsmen"?
12. Since I made this suggestion in 1981, more than just anecdotal evidence supports the contention that violent behavior in children may be caused by constant television-watching's numbing the children's sensibilities (*Chicago Tribune*, 1990).

Education of the young is one of the most important activities of a civilized society and should not be politicized. Equal access to quality education is part of one of the basic obligations of our society under the social contract. Demagoguery has no place in that most vital area of our national life.

Education is not meant to warehouse children until they are of age. The current creation of a whole underclass of "degreed illiteracy" is a sham and only widens the chasm between the economic classes. Poverty as an excuse for crime must be abolished as far as possible, and the only realistic way to break the cycle of poverty is education.

13. The recent spectacle of a New York judge practically exonerating a Chinese immigrant for the murder of his wife on the basis of "Chinese" custom is appalling and typifies a distorted and harmful comprehension of the meaning of cultural mores and diversity in our society.
14. See the Preamble to the Constitution of the United States ("promote the general welfare").

REFERENCES

- Alexander v. Virginia*. (1973). 413 U.S. 836.
- Austin, John. (1875). *Lectures on Jurisprudence*, Vol. 1. New York: James Cockcraft.
- Bentham, Jeremy. (1962). *The Works of Jeremy Bentham*, Vol. 1. New York: Russell & Russell.
- Bentham, Jeremy. (1970). *An Introduction to the Principles of Morals and Legislation*. London: Athlone Press.
- Burger, Warren E. (1981). "An Agenda for Crime Prevention." *American Bar Association Journal*, 67.
- Chauvin, L. Stanley, Jr. (1990). Editorial. *American Bar Association Journal*, May.
- Chicago Tribune. (1990). *Report by the Television Committee of the American Academy of Pediatrics*. April 17.
- Federal Victims of Crime Act. (1984). Title 42 of the United States Code, Section 10601, *et seq.*
- Melancon v. McKeithen*. (1972). 345 F. Supp. 105 (D.C.E.D.La.), *aff'd per curiam*, 409 U.S. 943.

- Minneapolis & St. Louis R.R. Co. v. Bombolis*. (1916) 241 U.S. 211.
- "Murder America," *Newsweek*, July 9, 1990, p. 7.
- Sutherland, Edward H. (1967). *White Collar Crime*. New York: Holt, Rinehart & Winston.
- U.S. Bureau of the Census, Department of Commerce. (1980). *Statistical Abstract of the United States 1980*. Washington, DC: Government Printing Office.
- U.S. Bureau of the Census, Department of Commerce. (1985). *Statistical Abstract of the United States 1985*. Washington, DC.
- U.S. Bureau of the Census, Department of Commerce. (1988). *Statistical Abstract of the United States 1988*. Washington, DC.
- U.S. Bureau of Criminal Justice Statistics. Criminal Justice Information Policy, Department of Justice. (1984). *Victim/Witness Legislation: An Overview*. Washington, DC.
- U.S. Bureau of Criminal Justice Statistics, Department of Justice. (1990). *Justice Expenditures and Employment 1988*. Washington, DC.
- U.S. Bureau of Criminal Justice Statistics, Department of Justice. (1988). *Report to the Nation on Crime and Justice* (2d ed.). Washington, DC.
- U.S. Bureau of Criminal Justice Statistics, Department of Justice. (1989). *Sourcebook of Criminal Justice Statistics 1988*. U.S. Department of Justice. Washington, DC.

Street-Crime Victim Compensation, Retributive Justice, and Social-Contract Theory

GILBERT S. FELL, PH.D.

INTRODUCTION: THE NATURE OF RETRIBUTIVE JUSTICE

To answer the question of Socrates "What is justice?" would seem at the very least to require an answer something like: setting things right, or attempting to remedy some condition of imbalance. This answer, in turn, has generally meant that considerations of justice are divided into two parts: a retributive aspect and a distributive¹ aspect. These categories are not mutually exclusive; on the contrary, they are often intimately related, but for the purpose of this discussion, they may be separated.

The distributive function has to do with fairness and corresponds to a positive pole; the retributive division constitutes the negative pole and entails crime, punishment, tort, deterrence, and compensation. The retributive aspect has a curiously conservative cast in the sense that, in the course of "setting things right," there is a sort of "paying back," a restoring, a "clearing the air," a reconstituting and reforming, and, perhaps less frequently, a

rehabilitating—essentially a recrudescence of the monastic ideal. The origin of the penitentiary demanded of the lawbreaker a repentance—"a turning back" or "around."

The idea of a restoration of balance is a metaphysical principle, a detailed account of which would range far from the specific subject of this chapter, but nevertheless this idea probably undergirds the whole distributive and retributive dichotomy. It also is reflected in our earliest records of musings and myths regarding the origins of the world, as well as in our theological tenets regarding atonement. It is a massive and poignant motif running through epic literature from Homer and Job to Conrad.

Retributive justice, broadly defined, would seem to embody six distinct elements:

1. *The punishment of transgressors*, which can be accomplished for its own sake; it is morally obligatory, if you will, and is divorced from any gain by either the state or the victim. Under this rubric occurs the reformation or rehabilitation of lawbreakers.
2. *The nature of crime and of moral responsibility*, which deals properly with what is law and order, the degree of culpability, and a definition of what behavior is criminal.
3. *The restoration of peace*, which is to say that fundamentally conservative political task of returning matters to the peaceful status quo.²
4. *The protection of society*, so that its commerce and recreation may proceed tranquilly, that is, without terror on the streets.
5. *Deterrence*, which is a deliberate effort to discourage the repetition and emulation of wrongdoing.
6. *Compensation or reparation* to those who have been wrongfully harmed, for example, the street-crime victim. It is this sixth facet and how it fares under the rubric of social-contract theory that are the chief concerns of this chapter.

In some respects the idea of compensation would seem to be the most elemental of all the tasks ascribed to the dispensation of

justice, for it is somehow embodied in the irreducible aspect of justice called *satisfaction*. Retribution, after all, includes (1) a getting back of something wrongfully taken; (2) a "getting back to" (the way things were, the normal or original state of affairs); and (3) a "getting back at," that is, revenging oneself against those who have done one wrong.³

BRIEF HISTORY OF RETRIBUTIVE JUSTICE

In that early promulgation of law by Hammurabi, known as *lex talionis*, or "an eye for an eye," the retributive notion of setting-things-right is clearly discernible. This rule, which seems rather harsh when not viewed in historical context, was actually an attempt to amend that most primitive behavior: When the strong man was offended, he wreaked his vengeance until his blood lust abated without regard to merely "evening things out"; it was rather a case of settling scores. *Lex talionis* was gradually seen as irrelevant to justice. It was thus transformed by the Deuteronomic system into a still more modified form in which each hurtful act required of the offender a certain compensatory payment in goods or services. This idea of compensation has been reinstituted today in the procedure of sentencing convicted persons to perform community services. But such sentencing, of course, has the obvious disadvantage that the services are rendered not to the victim, but to the community. The victim still goes begging.

In the Middle Ages the state was theoretically conceived of as the constabulary of the church. While the penalty aspect grew, however, the remedy factor, understood as restoring the rightful claim of the victim, withered. Originally retribution and some sort of compensation must have been a familial or individual matter. In England, a buy-back system was long in effect in which the one who had broken the law could "buy back the peace he had broken" by the act of paying *bot* according to a schedule of levies set forth on behalf of the victim. The so-called Dooms of Alfred in the ninth century permitted private revenge only after the offender had

failed to make restitution. Parenthetically, this ancient custom still survives, as when an embezzler, by promising restitution of ill-gotten gain or negotiating a deal with an insurance carrier, persuades a prosecutor not to press charges.

Some time later, a *wite* was demanded to pay the king or lord for the assistance he rendered in securing the *bot*. But by the twelfth century, perhaps because of greed and power hunger of the lords and nobility, the *bot* had diminished and the *wite* had grown in inverse proportion (Jacob, 1974). Indeed, it was only a matter of time before there was only *wite* and no *bot*.

Although it is not clear just when the state ended the private settlements of debts and quarrels, this termination of private settlements of disputes must have become a political necessity early in history. For example, in our society, when children play for more than a few minutes things tend to get out of hand. The strong will soon take more than their due; the weak, without allies, will be unable to assert or obtain a just claim. It seems clear that private vengeance belongs to that state of affairs in which rights have not yet been articulated and actualized, but when rights are secured, the exercise of private vengeance must be terminated.

It is obvious that the private settling of scores or setting things right was perilous to the commonweal for two reasons: (1) it contained within it the high probability of blood feuds, with their inherently contagious terrorism; and (2) there was the danger of the formation of large groups of allies, a development that would constitute a threat to the sovereign. Moreover the sovereign, as well as the community (no matter what its policy), jointly saw crime as an attack on the public at large: "a breach of the king's peace." This joint view, in turn, provided the state with a rationale to seek a share of the damages or compensation. Finally, because hurt and indignation are often personal and particular, whereas law must be general, formal, and universal, the intervention of the community at large was needed to guard against undue biases and excesses of personal revenge or vendettas. The earlier obligation of the state to help the injured party to become whole again, to regain his place in the community and, in the case of physical or

psychological injury, to regain earning power and to be compensated for the cost of medical care, however, simply seemed to disappear.

Historically, there have been three approaches to restoration: composition, compensation, and restitution. Composition has evolved from its original meaning as the act of making a mutual agreement for the discharge of some debt to the present-day jurisprudential system of tort law. As the name implies, composition requires the wrongdoer to make good the loss suffered by the victim. (The problem here is that, because the wrongdoer often comes from the poorest segment of society and is in all likelihood "judgment-proof," a resort to peonage would be required.) By contrast, compensation is paid by the state to the victim, and it is based on the notion of the state's responsibility to protect its citizens and its presumed incurrence of liability when that protection is inadequate or nonexistent.

The upshot of this long historical process, in which retribution fell more and more on the state, was to leave the victim, in effect, a forgotten person, a hard-luck case as far as the state was concerned.

THEORIES OF CRIME-VICTIM COMPENSATION

The major purpose of the rest of this chapter is to examine that most popular theory of political obligation, the social contract, to see to what degree (if any) it provides grounds for crime victim compensation or restitution by the state.

Theories of political obligation, perhaps more accurately called myths, generally arise from one or a combination of three primitive assumptions: organic, economic-advantage, and social-contract assumptions.

Out of the organic idea emerge those theories of political obligation that are based on the communal nature of humans. Helpless and heartless without community, the individual person is understood as a product of a social medium.

The second idea holds that the underlying motive of political and social organization is attainment of economic advantage and mutual benefit. The state is seen to rest on necessity engendered by the division and specialization of labor.

But it is the third idea, the social contract, that provides the metaphysical basis for contemporary discussions of political obligations. For Hobbes (1964), the contract depends on a double taproot: remedying the instability inherent in the equality that nature bestows upon humanity (wherein any person may kill any other) and avoiding pain. For Rousseau (1950), however, the political organization is designed to grant legal equality even in the face of natural inequality. For the purpose of this chapter, however, such differences are not crucial.

THE CONCEPT OF THE SOCIAL CONTRACT CRITICALLY EXAMINED AS A JUSTIFICATION FOR CRIME VICTIM COMPENSATION

The popularity of this idea of the social contract is attributable to several factors: (1) it justifies the increasingly formal interpersonal relationships demanded by the social organization of modern states; (2) it is in tune with the temper of modern democratic society, which has absorbed its fundamentally egalitarian bias, that is, "to find a form of association which shall defend and protect, with the entire force, the person and goods of each associate, and, by which, each, uniting himself to all, may nevertheless obey only self" (Rousseau, 1950). (3) it generates a sovereign or seat of authority that can be appealed to on utilitarian and pragmatic self-interest grounds; and (4) it incorporates the notion of implied consent required by contemporary nation-state polity.

The claim against the state for street-crime victim compensation is clearly seen to be premised on a juristic theory of "implied contract"—that most elastic and "greediest" of legal categories.

In juristic theory, a contract, express or implied, has four

specific ingredients: (1) an offer; (2) an acceptance; (3) a consideration; and (4) performance.

The Offer

Fundamentally, the offer of the state is that it will protect its citizens, secure their property, and guarantee that they will live out their days in peace—insofar as that guarantee rests upon external order. The social contract thus being offered is not formulated to give people food stamps or to provide for the collection of garbage; if it is to have any meaning at all, it must be formulated to protect citizens physically from their enemies, both foreign and domestic. Every other service that governments offer is ancillary to this number-one priority.

The Acceptance

It is assumed that, when citizens live in peace without rebellion and are able to conduct their commerce in security, they have accepted the social contract.

The Consideration

The state now has a claim on the individual to which the individual acquiesces, as by the payment of taxes and the rendering of services to the state, for example, service on juries and in the armed forces. On the other hand, on its part, the state establishes a criminal justice system to protect the individual.

Performance

It is here that a problem arises. In the first place, because the duty to perform on the part of the state is not generally enforceable, the "contract" belongs to the realm of duties that Kant (1987) named the "imperfect obligation." The modern state is not com-

pletely invulnerable to foreign enemies; the citizen cannot always expect perfect protection from the state.

Moreover, citizens today are obviously not completely safe from domestic enemies on the streets or in the home. The social contract is obviously not working properly when a little old woman is mugged and her color TV is carried out of her flat, and the police fail to arrive for forty minutes, and when they do, the most likely upshot is merely the filing of a report. Nor is it working properly when one visits a friend and knocks on the door and hears the throwing of bolts within, the turning of locks, the clanking of chains, and sounds emanating from within that make one feel as though he or she were seeking access to the Tower of London. In such situations, we realize that the social contract is in grave danger, that its most basic feature has been, in fact, nullified, and that human beings have been forced back into their original Hobbesian condition, where "perpetual fear" dogs their steps.

In terms of the social contract then, the citizen today has a strong *prima facie* case against the state for nonperformance or failure of performance. But there are several factors that cast doubt, not on the legitimacy and rightfulness of such a claim, but on the adequacy of the social-contract theory to sustain it.

In the first place, there is the oft-voiced objection first raised by Bentham (1843) to the very idea of a social contract:

Whence is it, but from government, that contracts derive their binding force? Contracts came from government, not government from contracts. It is from the habit of enforcing contracts, and seeing them enforced, that governments are chiefly indebted for whatever disposition they have to observe them.

The notion of the social contract may be seen as a classic example of the logical fallacy of composition: to assume from the existence of numerous small contracts within the body politic a sort of transcendent Great Contract.

The further objection of Hume (1948) is not without some

force: What kind of contract can there be that cannot be abrogated? In this same vein, one cannot help but observe that there hardly can be a contract where there is neither voluntary consent nor full knowledge when the contract is entered into.

Again, in a democracy, the citizens must somehow be contracting with themselves, as the state theoretically is not a separate metaphysical entity but an incorporation (*in corpore*, an "inbodyment"). So the victim who brings suit against the state is in some sense seeking compensation from himself or herself. A recognition of this fact is found in the requirement that a citizen must obtain permission from the state to sue the state.

In the modern nation-state, the fictitious and artificial nature of an alleged social contract becomes apparent when we recognize how pitifully small is the party of the second part: the big count for more. The victim is often twice victimized: she or he is victimized once by thief or mugger and then is overwhelmed and dwarfed in the criminal justice system by her or his huge supposed ally, the government.

Admittedly, being a contract of imperfect obligation, the social contract has no third party to enforce it—except something like a "decent respect for the opinion of humankind." On the other hand, the contract is inherently unequal, for the state has the capacity to compel performance from the citizen, but there is no corresponding reciprocity except as the state permits one through its own courts. As to the state's failing to perform, as in the case of inadequate police or fire protection, the political entity can always plead that it acts in good faith and that its failure to perform in a satisfactory fashion is due to circumstances beyond its control.

Another objection to the social-contract theory, although a general one that does not bear directly on crime victims' compensation claims, is that, by the use of a legalistic formula to describe and characterize the relationship of the individual to the state, that very relationship is trivialized. The advantage of community and communal law does not emerge out of some legal fiction. People are bound to land and country—to trout ponds and mountains, to good and level land for wheat, to a certain stand of sugar maples,

to a stretch of beach, and to each other—by more compelling flesh-and-blood ties, that is to say, by physically existing entities, and not by some quasi-legal, heuristic contract.

Such objections lead to perhaps the most serious challenge to social-contract theory as a basis for defining the relation of the individual to the state, that is, that social-contract theory rests on a naive idea of an initial social atomism that resulted in an association of fully formed persons, an idea that runs contrary to empirically well-established psychological canons of human development. To understand the classic formulations of the social-contract theory is to have a picture, on the one hand, of the predatory wolf engaged in the *bellum omnium contra omnes* ("the war of all against all") and, on the other hand, of a lamblike patsy ever victimized and led astray. Whatever the mythopoeic imagery employed, humans were seen as complete and whole, as free agents striking some kind of deal with others. Whether in its historicist or essentialist garb, social-contract theory rested on the unproven belief that humans, as humans, joined together for mutual protection and to ensure the common good.

All of the foregoing discussion leads to yet another flaw in the social-contract fabric, especially as it bears on the claim of victims against the state. A case might be made that the state, as party of the first part, has an inherently unequal contract, for if the state would fully or nearly fully perform, then the state would give, pursuant to contract, much more than it would receive. The citizens receive from the community their language, their special definition, and their personal identity. Indeed, in these times of rampant individualism and self-interest groups, it might be well to recall some of the gifts bestowed by the corporate life we have in the state. It is unfortunate that those tyrannous caricatures of the state that we have seen in the twentieth century should have blinded us to the debt that we owe to the modern state, for example, generally peace and order (as contrasted with violent anarchy and chaos), which reduces fear and permits the pursuit of art, culture, commerce, learning, and so on.

It thus seems clear that the social-contract doctrine appar-

ently does not provide a firm theoretical scaffolding for a crime victim's legitimate claim to compensation from the state. This is not to say that the victim does not have any basis for such a claim, nor to deny its merit; simple justice of the retributive sort seems to require it. As Sutherland has pointed out:

It is rather absurd that the state undertakes to protect the public against crime and then, when a loss occurs, takes the entire payment and offers no effective remedy to the individual victim. (Schafer, 1960, p. 118)

ALTERNATIVE JUSTIFICATION FOR CRIME VICTIMS' COMPENSATION

At this juncture, it is important to avoid the philosopher's fallacy, that is, the belief that theoretical failure leads inevitably to paralysis of action. What seems beyond doubt is that victims of street crime have at least as good claims to compensation as victims of earthquakes, forest fires, floods, droughts, and bank failures. All of these classes of claims are often compensated in one way or another by government action.⁴ The enlightened modern state is coming to recognize the fairness of such compensation, not because a theoretical foundation has been laid, but because a human sense of simple justice self-evidently demands it.

Perhaps the innate fairness of the compensation claim by the victims of street crime rests somehow on a kind of organic sense—not on a formal notion, but on simple "fellow feeling." This feeling is analogous to those expressed by thinkers as different as Plato (1982) and St. Paul, namely, that in the body politic, as in the physical body, when one member suffers all suffer. That feeling, after all, provides the justification for the state's considering itself an aggrieved party when a crime is committed. Consistency requires balancing the situation by insisting that the state now owes a debt to the victim.

It might be well to recall at this point that the state is an elaborate existential fiction. An innate nominalism arises from time to time, reminding us that we the people are the state, and that when an innocent citizen is harmed by malefactors, it is a case of "There, but for the Grace of God, go I."

Aristotle (1957) once cogently observed that "justice is the bond of men and states, for the administration of justice, which is the determination of what is just, is the principle of order in political society." To paraphrase G. E. Moore's famous dictum regarding metaphysics: Political theory seems to be conjuring up elaborate theories for what we believe on instinct. When theory and the sense of justice conflict, or when a theory fails to support an intuitive or instinctive feeling of justice, it is probably most appropriate to let the theory go, or at least to go back to the philosophical drawing board and find out where we went wrong or find another theory sufficient to support our instinctual notions.

NOTES

1. "*distributive justice*, one of the two divisions of justice . . . that which consists in the distribution of something in shares proportionate to the deserts of each among the several parties" (*Oxford English Dictionary*, 1989, p. 869).
2. Fighting crime as the chief function of police work is a comparatively modern concept. Traditionally the task of the constabulary was the maintenance of conditions of order and tranquility in the body politic; hence, "peace officer."
3. When people complain about the lack of justice in the modern world, they are probably concerned not merely with fairness, but also with satisfaction. It is a nice and perhaps insoluble metaphysical problem to reflect on whether, and how, there can ever be satisfaction in the full sense of the term.
4. Perhaps if street crimes happened to a large number of persons in one place at one time, as in airline hijacking, then society, being so readily moved by numbers, might be more responsive to the problem. But the victim of a street crime is, more often than not, an individual or a small group, and consequently a typical "tough luck" attitude prevails.

REFERENCES

- Aristotle. (1957). *Aristotle's Politics and Poetics*, Book 1. (Benjamin Jowett and Thomas Diamant, trans.). New York: Viking Press.
- Bentham, Jeremy. (1843). "Anarchical Fallacies." In *Works*, Vol. 2. (John Bowring, Ed.).
- Hobbes, Thomas. (1964). *Leviathan*. New York: Washington Square Press.
- Hume, David. (1948). *Moral and Political Philosophy*. New York: Hafner.
- Jacob, Bruce R. (1974). "Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process." In *Victimology*, Vol. 1. (Drapken and Viano, Eds.). Lexington, MA: Lexington Books.
- Kant, Immanuel. (1987). *Fundamental Principles of the Metaphysics of Morals*. Buffalo, NY: Prometheus Books.
- Oxford English Dictionary*, 2nd ed. (1989). Oxford: Clarendon Press.
- Plato. (1982). *Plato, The Collected Dialogues; The Republic*. (Hamilton, Edith and Huntington Cairns, eds., Paul Shorey, trans.). Princeton: Princeton University Press.
- Rousseau, Jean-Jacques. (1950). *Social Contract and Discourses*. New York: Dutton.
- Schafer, Stephen. (1960). *Restitution to Victims of Crime*. London: Stevens & Sons.

Rescuing Victims— from Social Theory

TIBOR R. MACHAN, PH.D.

INITIAL CLUES FOR INDIVIDUAL RESPONSIBILITY

To talk and think meaningfully of victims, apart from some metaphorical uses of the concept—as in “Harry Brown, 68, A Victim of Cancer,” a possible obituary title—implies acknowledgment of culpability on the part of people for certain actions. The existence of genuine victims implies culpable perpetrators of wrongful injurious conduct.

By contrast, the concept of causality does not imply such a culpable agency; for example, cancer or earthquakes produce casualties, whereas criminals act intentionally and deliberately against victims. The concept of a victim implies the recognition of some measure of personal responsibility for injurious conduct perpetrated by one human being against another.

This recognition suggests a particular perspective on the status of victims in any tenable social theory. It provides a clue to the need within such social theory for personal responsibility. Of course, there are other clues pointing to this need. The act of theorizing or the criticism of alternative theories implies some measure of personal responsibility. As D. Bannister (1970) observed,

a theorist of human behavior "cannot present a picture of man which patently contradicts his behavior in presenting that picture" (p. 417). But any social theory that admits the idea of a victim within its conceptual framework does much more. It gives rise to the strong likelihood of culpable moral and legal responsibility as a fact of human social life.

Yet much of contemporary social theory denies that human beings are, in the last analysis, individually responsible, and thus capable of being culpable, for their actions. Three social theories come to mind.

BEHAVIORISM AND INDIVIDUAL RESPONSIBILITY

First, behaviorism, which still enjoys considerable popularity within institutional psychotherapy, denies individual responsibility. As B. F. Skinner (1953) told us:

If we are to use the methods of science in the field of human affairs, we . . . expect to discover that what a man does is the result of specifiable conditions and that once these conditions have been discovered, we can anticipate and to some extent determine his actions. (p. 6)

To avoid any possible ambiguity in what Skinner told us, we must recall Skinner's explicit claim concerning free will: "It appears . . . that society is responsible for the larger part of the behavior of self-control . . . and we account for it in terms of other variables in the environment and history of the individual" (p. 240). Skinner added, consistently, "It is these variables which provide the ultimate control" (p. 240). A full-blown, consistent behaviorism thus precludes personal responsibility and by implication denies the very existence of victims of either moral or legal wrongs, at least in any familiar way of comprehending these moral ideas.

Some might believe that all Skinner and the behaviorists claimed is that proper scientific methodology required excluding certain ideas (e.g., of criminal responsibility and of victimization). Yet there remains plenty of room for them outside the domain of scientifically controlled experiments. Perhaps Skinner overstated his point, but when properly understood, his behaviorism can be confined to the domain of experimental psychology, where it is quite useful and valid.

On the other hand, science is widely regarded as the most reliable and systematic means by which human beings are to learn about various realms of reality; so if science requires abandoning the idea of individual, personal responsibility, Skinner would have our ordinary understanding follow suit as early as possible. In any case, if a methodology for gaining understanding precludes the soundness of such an idea as personal responsibility, it is difficult to see how any comprehensive and consistent theory dependent on that methodology could nevertheless include the concept of personal responsibility.

MARXISM AND INDIVIDUAL RESPONSIBILITY

The second example of a social theory that leaves no room for individual or personal responsibility is Marxism. Granted, by now it is difficult to attribute to Marx himself any general philosophical claim without some Marxist claiming that either Marx or the more developed forms of Marxism he or she represents have been misconstrued. Nevertheless, it is safe to say that, if there are any definite meanings to the words Marx published, we cannot escape the conclusion that he did not regard persons as individually responsible for their conduct.

For Marx, before the emergence of communism—wherein we would escape the necessities imposed on us by nature and pre-communist society—individual responsibility cannot be attributed to persons. For him, human historical development is a process that is closer to what we expect from the accounts of

botanists, geologists, zoologists, and evolutionary biologists than to what we might receive from historians of moral and political affairs. Marx (1970) clearly made the point that "the evolution of the economic formation of society is viewed as a process of natural history" by Marx; that "can less than any other make the individual responsible for relations whose creature he socially remains" (p. 417).

Although Marx declares, "it is men who change circumstances and . . . it is essential to educate the educator himself" (p. 156), the initiation of the change of circumstances lies with humans' productive relations in society, not with their chosen (mental) conduct. The reason is given by Marx in his famous statement that "It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness" (p. 417).

Just how crucial the denial of personal responsibility is in classical (i.e., Marx's own) Marxism can be appreciated from recalling that virtually all of the central elements of Marxian social analysis—exploitation, alienation, revolution, and class consciousness—would drop out of the Marxian picture if individuals could, under normal bourgeois circumstances, determine their own action, by significantly influencing their own political, economic, and related circumstances. Certainly the most crucial feature of historical materialism would disappear if the inevitability of collective—though not necessarily violent—revolution were not to be understood as an inherent part of the idea of humanity's progressive development toward communism.

So Marxism, too, is a social theory that denies individual or personal responsibility, at least for human beings who are not living within a communist stage of humanity's development. Nor does Marxism leave room for some of the more sophisticated neo-Marxist claims, namely, that although most human beings are indeed powerless, and thus without personal responsibility for what happens to them in life, the members of the ruling class are indeed culpable: they are personally responsible, for example, for perpetuating social structures that thwart social progress or at

least slow it down.¹ This kind of Marxian analysis would wish to be able to blame reactionaries for their victimization of the working classes. Yet, for Marxism to be the interesting, the exciting, and the distinctive social theory that it has been taken to be, the movement of human development along dialectical lines cannot be a matter of personal choice at any level of analysis or practice, even at the level of the ruling class, because the laws of dialectic, not human individual choices, are responsible for the movement of history and make possible the scientific prediction of the onset of communism.

The prominence of Marxian analysis to this day is undeniable, despite some serious misgivings about Marxism by many of its contemporary champions (Elster, 1984). The logic of Marxism, as we have seen, denies that individuals are responsible for what they do. So within Marxism, too, no room can be found for the concept of a victim in social or legal theory, a concept that depends for its meaningfulness on the possibility of culpable and thus freely chosen human conduct. Indeed, it is arguable that this aspect of Marxism explains in large part why so much brutality could be performed in the name of Marxism; never mind whether Marx himself would have been for or against it.

SOCIOBIOLOGY AND INDIVIDUAL RESPONSIBILITY

There is another perspective that has gained prominence in our time, namely, sociobiology (Wilson, 1975, 1978). Here again, there is no logical room for individual or personal responsibility and thus for victimization. Sociobiologists state that it is ultimately our genes that propel us to behave the way we do. Again it is nonsense to hold individuals responsible for what they do to the other person, be it beneficial or harmful.²

To take a less widely known version of the sociobiological perspective, if we accept that the earth itself "is most like a single cell," so that "We should credit [the earth] for what it is: for sheer size and perfection of function, it is far and away the grandest

product of collaboration in all of nature" (Thomas, 1974, p. 4). Then again, individual responsibility of what happens on earth, from ecological misconduct to violent crime, must be precluded. Just as no one would think of blaming or crediting a person's separate fingers, joints, organs, or limbs for any crucial behavior by the person or its consequences, so if the globe really is like a cell (i.e., an organism of which we human beings are merely parts, segments, or portions), then we are no more responsible for what happens on different parts of the globe than are our body parts responsible for what we do, even in cases of the most viciously calculated violent victimization that we ourselves may engage in.

OTHER SOCIAL THEORIES AND INDIVIDUAL RESPONSIBILITY

There are a few prominent views that dissent from the above, but even they do not hold out much promise for the concept of individual moral or legal responsibility and thus for the concept of a victim in social theory. For example, existentialism admits that some measure of human freedom of choice exists. Yet it denies that there is any justification for claiming that some objective (i.e., commonly detectable, publicly evident) standard of conduct exists for evaluating the acts that existentialism admits human beings choose to perform. So freedom of choice is affirmed here, but any idea of an objective (stable, firm) standard of right and wrong is banished (at least at the fundamental level) from this perspective.

Yet, for there to be *bona fide* victims, something objectively wrong must have been done to someone. If no objective standard of right and wrong exists, then there is no rational or well-founded support for claiming (truly) that something wrong is ever done to anyone, even when that something is harmful and was done to someone by another as a matter of free choice. From such a state of affairs, no well-grounded social theory of victimization can emerge.

Nor need we confine ourselves to existentialism when we observe the denial of objective standards of right and wrong in contemporary views of human life. The bulk of contemporary philosophical ethics, politics, and consequently jurisprudence denies the possibility of objective standards of right and wrong, even while condemning the immorality of egoism or hedonism (on heaven knows what basis!).

We therefore can fairly assert that much of contemporary social theory lacks any objective basis for individual or personal moral and legal responsibility, either because it denies basic choice to individuals or because it denies any basis of an objective differentiation between rightful and wrongful conduct. Certainly no one denies that moral and legal pronouncements can be uttered. The question is whether the meaning of these could be anything more, within such theories, than arbitrary exclamations, emotive expressions, or, as one philosopher characterized them, "boos" or "hurrahs" (Falk, 1986).

SOCIAL THEORY AND LAW

There can be little doubt that, in positive law, ideas carry considerable impact. After all, in legislatures, in courts, and in political discourse, people put forth arguments supported by ideas, some of which become accepted by the public and get translated into legal norms. Most recently, for example, the views of several legal theorists—such as Ronald Dworkin and Richard Posner—have made deep impacts on current American jurisprudence.

Ronald Dworkin (1977, 1986) has spearheaded the reconsideration of a somewhat perplexing version of natural-law theory. Not only does Dworkin argue that there exists some basis for objective moral truth, but he also advances many substantive theses about what decisions courts should make in various kinds of cases. Decisions, he believes, are justified by certain fundamental and objective moral principles.

From a different viewpoint, there has come forth another influential idea, namely, the economic analysis of the law, developed by such legal theorists as Richard Posner (1981). Here the emphasis is placed not on some alleged objective basis for moral and legal judgments but on the idea that law ultimately reflects the principles of economic efficiency. In effect, the "law-and-economics" thesis holds that all court rulings tend on the whole to reflect what will predictably yield the most economical arrangements within a given human community. Although the substance of this view would pretty much diminish if not eliminate the role of individual responsibility as a basic causal element in human affairs—because it assumes the inevitable or unfailing force of economic efficiency as the prime motivator of human behavior—there is no doubt that the theory itself has had considerable impact. (Posner is now a federal judge.) The theory rests, ultimately, on the doctrine of *homo economicus*, derived ultimately from Thomas Hobbes's reductive materialism, according to which everyone is automatically moved to advance his or her own best interest. Such a view leaves no room for personal responsibility because of its complete determinism.

What is interesting about these influential views of the nature of law is that, in certain respects, they embrace notions that are deemed alien to the very starting point of these views themselves. First, Dworkin, although he has rekindled an interest in moral principles, and thus in personal moral and legal responsibility, is in fact a political egalitarian and finds the idea of the right to individual liberty unfounded. Yet that idea is central to the belief in individual moral responsibility. If one is not free to act as one chooses—if the law compels one to do the right thing, if political regulation instead of individual conscience determines how members of a human community will conduct themselves—then one cannot be morally responsible for what one does. This view, then, is plagued by the opposite problem from the one we identified in connection with existentialism. To endorse moral responsibility without the right to individual liberty is no better than to endorse

human liberty but deny any moral standards according to which this liberty ought to be exercised and judged.

On the other hand, the perspective embraced by Posner and his followers favors a more-or-less unregulated economic and social system, one that leaves matters of economic and cultural development to individuals. Thus this view is often considered conservative and even libertarian, apparently favoring individual liberty over social regulation. Yet, because the view rests on the *homo economicus* conception of human nature, whereby acting individuals are automatic and constant utility maximizers, it rules out individual responsibility once again. (I develop these points, as well as some that follow, in my book *Capitalism and Individualism: Reframing the Argument for the Free Society*, 1990.) Although it may appear that the Posner position distinguishes between responsible and irresponsible individuals, that is not the case. Rather, all individuals are utility maximizers and anything they strive for counts as their utility. Thus the Posner position is probably vacuous, as it amounts to saying that all persons do what they do, period. Yet his position is very prominent within contemporary neoclassical economic theory.

So here, too, we can see the contemporary currents of thought undercut the basis for a cogent conception of victimization. Is there any viewpoint that may serve as an alternative to those mentioned above, ones that clearly leave no cogent place for the concept of the victim in social theory? In the next section, such an alternative is proposed, and some of its advantages, from the viewpoint of social theory, are discussed. This presentation is far from exhaustive, but it should offer some initial steps in a possibly very fruitful direction.

THE CRIMINAL AND THE VICTIM

If in the course of our lives one of us would find it necessary to harm some limb of ours for medical reasons, we would not regard

this as a case of victimization. When the actor Richard Harris had his nose rebuilt with bone extracted from his pelvis, nobody could reasonably construe his pelvis as a victim, except perhaps metaphorically, as, say, in a poem or song. Similarly, when we subject ourselves to severe stress in an effort to achieve some important goal (e.g., to climb the Matterhorn), it makes no sense to regard this action as victimizing our body, nerves, or whatever else may suffer in the process.

In general, it is fair to conclude that whole persons who are assaulted or harmed by others are not sensibly regarded in the same way as parts of some whole that must sometimes be harmed for the benefit of the whole. The conclusion seems philosophically reasonable enough. But it is also clear that this conclusion is not widely defended. Even those who would seem to favor it tend to embrace ideas that contradict it. I have already mentioned the "law-and-economics" school. Certain other conservative viewpoints, more closely aligned with traditional nationalism and with theism, would tend also to make individuals parts of some greater whole—or at least dependent on some higher reality to which they owe their identity and loyalty. Nevertheless the implicit individualism of our criminal law, in which aggressive individuals are often enough regarded as morally and legally culpable and, at the same time, their victims are not deemed expendable even for the sake of attaining very noble goals, has some theoretical support from existing philosophical perspectives, even if these have not reached the kind of prominence required for them to become the foundation of social theorizing.

In particular, the American political tradition contains the basic idea that individuals possess fundamental rights, namely, the Lockean trilogy of life, liberty, and property—the pursuit of happiness. If these rights are well founded, they testify to something of a philosophical base for individualism. But this individualism is not the kind that is most often discussed, namely, the kind we associate with the philosophy of Thomas Hobbes, whereby an individual person has individuality only in being separate from others in time and space. Rather, the individual presupposed in

the Lockean doctrine is a *human* individual with rights. That is to say, he or she is not an atomic self and merely conventionally human. Rather he or she is an individual of a certain kind. But by being a certain kind of individual, he or she does not become deprived of individuality, as in such collectivist outlooks as Marx's (1970). Being a human being within this individualist perspective means that it is rational to classify someone as having natural similarities with others, but not as being part of a larger "individual," for example, the collective entity called *humanity*.

With this more robust individualism, there must also be found a theory of free action before we can coherently discuss individual or personal moral and legal responsibility. But that requires some cogent ideal of free will and/or self-determination. The doctrine of free will ideally must be recaptured in such a form that it does not fly in the face of the findings of science or naturalism. Indeed there is reason to believe that this is a promising prospect. Contrary to Skinner (1953, p. 6), for example, some theorists such as R. W. Sperry (1976) argue that it is not a requirement of science that behavior be always linked to some prior sufficient cause. Rather, it is possible—by reference to what Sperry has called "downward causation"—to construe the highly developed human organism as making it possible for individual human beings to engage in self-initiated conduct. This type of conduct involves a variety of causality in the universe, not some contradiction to or escape from causality, as critics of the free-will position have often alleged. The reason is that this position introduces the idea that there are different kinds of causal relationships, some involving the familiar efficient causation that most champions of science wish to universalize, others a "downward causation," the characteristic of which depends on the complicated constitution of the human organism. There are other types of causality also possible, depending on what kinds and types of entities are found in nature.

Although the several past centuries of mechanistic scientism would dismiss this idea, there is no such easy way to dismiss it within the framework of a pluralistic or nonreductionist concep-

tion of causality and the nature of reality, one that is gaining better footing in our time (Machan, 1974, 1982; Sperry, 1986).

But where does this lead us vis-a-vis the other problem, namely, whether any basis of moral and legal responsibility is available, whether objective moral and legal norms can be identified? Here is where the fact that this individualist viewpoint does not derive its philosophical basis from Hobbes comes to be significant. Because we are considering human individuals, the proper conduct and the moral life of each individual must first of all do full justice to her or his humanity. There are universal standards, although few, implicit here. Yet because the human essence, contrary to Marx, is not "the true collectivity of man" (Marx, 1970, p. 126), but rather the true individuality of man² (Machan, 1989; Norton, 1976), it is not possible in morality to ignore individual differences. Universality may thus be possible, but only for some very general moral principles. Objectivity, on the other hand, could be possible for any moral judgment, because the individual human being is an objective fact, and what will make that individual's life an excellent one is dependent on what and who that individual does and is.

All the above is only the beginning of a philosophical theory of individualism that makes it possible to construe human beings as individuals who have moral and legal responsibilities. From that theory, it may also be possible to derive the proposition that such individuals can be perpetrators of wrongful acts. Some of these acts may be directed against other individuals, who then would be the victims of the former (i.e., culpable violators of the rights of the person they have wrongfully injured, harmed, or otherwise demeaned).

The foregoing exposition is certainly only the broadest outline for a social theory within which genuine victimization makes sense. Even at this abstract level, the exposition generally accords with much of our common sense, our jurisprudential tradition, and our practices as theorists concerned with the questions that give rise to the position itself, that is, with the fact of our creative theorizing that is open to being faulted for certain failures, as well

as praised for successes. In other words, as theorists, we see that the position sketched here also makes room for the idea that we ourselves are responsible, professionally, for the quality of the theories we propose. As ordinary people, we see that the position makes room for our commonsense view that sometimes human beings do wrong to others and that sometimes they are personally blameworthy. As members of an organized human community, as citizens, we also see that this position allows that some of those who are wronged by others are properly regarded as victims, and that those who perpetrated the victimization are culpable for what they did and have to be treated accordingly.

If the above can also enjoy philosophical and scientific support, then perhaps we can take comfort in what one of the few contemporary theorists of individualism, David L. Norton (1976), has observed:

Beneath the accretions of contravening epochs and cultures a vestige of the original eudaemonistic intuition endures today, I believe, in the individual's residual conviction of his own irreplaceable worth. . . . At its first appearance it is buffeted by alarms and commotion, and trampled beneath the scurrying crowd. Propped upright it is conscripted to this cause or that where roll call is "by the numbers," truth is prescribed, and responsibility is collective, the individual's share being determined by arithmetic apportionment. What remains is a merely numerical individuation, deriving its fugitive worth from the collective whole of which it is a replaceable part. (p. x)

VICTIMS MAY BE CHAMPIONS

If the individualism urged above allows for victims, it also allows for those who would resist victimization, those who would choose to strive for justice in the face of it. So there is much more to the position than its giving room for the concept of *victim*. It also

makes it possible to think of righting the wrong of victimization. That is, if the position is sound, it follows that human beings are both subject to victimization and morally justified, if not encouraged, to forge responses, personal and institutional, to this stark fact of their existence. It follows, in short, that the social theories that affirm victimization are more potent than those that deny victimization or can make room only for casualties of the forces of impersonal nature. (No doubt, one can victimize even in response to initial victimization—as the law puts it, one may respond with “excessive force” or “unnecessary force.” But such nuances of the position discussed here would have to be worked out elsewhere.)

Social theory may, of course, have to admit that it cannot confine itself to a value-free stance, if there is to be room in it for personal, moral, and legal responsibility. Social theorists themselves may have to alter their way of thinking, perhaps by championing the cause of a certain kind of ontological individualism.⁴ This would give them theoretical ground for the influence that they have, not surprisingly, tried to muster. But there should be no *a priori* resistance to this. It would simply bring to the fore something that has been in the background all along, namely, that social theory is essentially normative. That is, in any theory of human social affairs, there must be room for some acknowledgment of basic values and norms. In other words, such a theory is incapable of fulfilling its mission of making sense of human social existence without clear and irreducible reference to the moral values or principles of human life.

NOTES

1. See Nielsen (1978). For a critical discussion of varieties of Marxism—see Arnold (1987). For my own analysis of Marx's thinking, see Machan (1988).
2. The counterargument that this is denied by Heisenberg's uncertainty principle (i.e., the view that it is impossible to determine simul-

taneously both the position and the momentum of any subatomic entities with complete accuracy) because, by its tenets, genes cannot completely determine acts but may behave indeterminately is untenable. First, that principle pertains, strictly, only to what we can know, not to what actually exists. Second, even if indeterminacy existed in reality itself, that would not do much for the concept of personal responsibility; that concept requires self-determination or the causal agency of the acting person!

3. Basically, the concept of a collective social or species being, as Marx characterizes the human essence, fails to differentiate human beings from other animal species; yet the self-governing, self-developing aspect of a person, whereby he or she forges a distinctive life for himself or herself (yet, of course, as a rational being), makes the individuality of each human being a central feature of his or her life—an essential aspect of human life itself—that is, part of human nature.
4. Ontological individualism involves the notion that the individuality of some being is fundamental, not reducible to some relationship or collective identity (Machan, 1990; Norton, 1976).

REFERENCES

- Arnold, N. S. (1987). "Recent Work in Marxism: A Critical Survey." *American Philosophical Quarterly*, 24, 277–293.
- Bannister, D. (1970). "Comment." In R. Borger and F. Cioffi (Eds.), *Explanation in the Behavioral Sciences*. Cambridge, England: Cambridge University Press.
- Barnes, H. (1967). *An Existentialist Ethics*. New York: Random House.
- Dworkin, R. (1977). *Taking Rights Seriously*. Cambridge: Harvard University Press.
- Dworkin, R. (1986). *Law's Empire*. Cambridge: Harvard University Press.
- Elster, J. (1984). *Making Sense of Marx*. Cambridge, England: Cambridge University Press.
- Falk, W. D. (1986). *Ought, Reasons, and Morality*. Ithaca, NY: Cornell University Press.

- Machan, T. R. (1974). *The Pseudo Science of B. F. Skinner*. New Rochelle, NY: Arlington House.
- Machan, T. R. (1982). "Epistemology and Moral Knowledge." *The Review of Metaphysics*, 36.
- Machan, T. R. (1988). *Marxism: A Bourgeois Critique*. Bradford, England: MCB University Press.
- Machan, T. R. (1989). *Individuals and Their Rights*. LaSalle, IL: Open Court.
- Machan, T. R. (1990). *Capitalism and Individualism: Reframing the Argument for the Free Society*. New York: St. Martin's Press.
- Marx, K. (1970). Preface to Volume I of *Das Kapital*. In *Selected Writings*. (David McLellan, Ed.) Oxford, England: University Press.
- Nielsen, K. (1978). "Marxism and the Moral Point of View." *American Philosophical Quarterly*, 24, 295-306.
- Norton, D. L. (1976). *Personal Destinies*. Princeton: Princeton University Press.
- Posner, R. (1981). *The Economics of Justice*. Cambridge: Harvard University Press.
- Skinner, B. F. (1953). *Science and Human Behavior*. New York: Macmillan.
- Sperry, R. W. (1976). "Changing Concepts of Consciousness and Free Will." *Perspectives in Biology and Medicine*, 2, 9-19.
- Sperry, R. W. (1986). *Science and Moral Priority*. New York: Columbia University Press.
- Thomas, L. (1974). *The Lives of a Cell*. New York: Viking Books.
- Williams, B. (1985). *Ethics and the Limits of Philosophy*. Cambridge: Harvard University Press.
- Wilson, E. O. (1975). *Sociobiology: The New Synthesis*. Cambridge: Harvard University Press.
- Wilson, E. O. (1978). *On Human Nature*. Cambridge: Harvard University Press.

A Systems Science Approach to Crime, Criminal Justice, and Victim Justice

JOHN T. CHU, PH.D.

INTRODUCTION

A systems science approach to the general problems of crime and justice is presented here, with the main emphasis being victim justice. The systems science approach is not confined to isolated problems. Instead, the entire "system" (i.e., the entire legal system) where those problems have arisen is examined, so that a broad and in-depth understanding may be possible. It is felt that victim justice is closely related to the definitions of crimes and criminal justice. To clarify the issues, I pose the following two questions:

1. What is an unlawful act or offense? I have not restricted my study to crime alone. Criminal and civil wrongdoing should be examined simultaneously and the wisdom of the traditional division of law into criminal and tort law should be questioned. Only then may a better understanding of both be possible.

2. What are offender justice and victim justice? Notice the word *offender* instead of *criminal*. The U.S. Constitution offers a good deal of protection to those who are accused of committing a

crime, but not much to those accused of civil wrongdoings, and almost none to the victims. Perhaps it is time to see how justice may be equally applied.

It is true that victim justice has greatly improved since the early 1980s. A bill of rights for crime victims was enacted by California voters in June 1982 (*West's Annotated California Codes*, 1988, pp. 721-723). On the federal level, Senator John Heinz's Victim and Witness Protection Act of 1982 became Public Law 97-291 on October 12, 1982. The federal Victims of Crime Act of 1984 must be viewed as a landmark. For details, see the U.S. Code (1988, pp. 813-815). Numerous similar laws have been enacted at the state level on behalf of victims. But somehow the problem of victim justice has yet to be satisfactorily solved, as is shown in the following examples:

A mother whose son had been killed by a robber in 1976 testified at a Senate hearing, "I was repeatedly told that the crime was against the state and will be handled as such The prosecutor acted like . . . I was the criminal." The same article also said that "no one informed her about services or counseling available to her . . . and she suffered from high medical expenses and red tape" (Omang, 1982, p. A3). Alan M. Dershowitz, a distinguished civil liberties lawyer and professor at Harvard University Law School, interviewed in a news magazine (Gest and Sanoff, 1982, pp. 62-63), maintained that "the U.S. legal system is such that all sides in a trial want to hide at least some of the truth. . . . The defendant wants to hide the truth, because he is generally guilty. The defense attorney's job is to make sure that the jury does not arrive at the truth." Dershowitz concluded that "truth suffers enormously in [this] adversary system of justice." But he still believes that the system is the best we can get, because "letting a guilty person go into court without a defense attorney and making him represent himself is horrible to contemplate." He did not express a similar concern about the victims.

Markman and Bosco (1989), respectively a forensic psychiatrist and a senior editor of *Prevention*, jointly wrote.

Though the criminal justice system tries to create the illusion of order and justice, it routinely ignores the need of the victim, or the victim's family, for justice. Not only does it often not work to protect us and maintain order, but it also loses touch with any reality beyond its own confusion (pp. 20, 99).

Markman then revealed that an attorney friend advised him to be a little more lenient in his reports, because the death penalty was back in and they would have to use psychiatrists more and more to protect their clients.

A news item (*New York Times*, 1990) reads:

A man who set fire to his son in 1983 . . . leaves prison on Wednesday. . . . The man's son, David, who was 6 years old at the time, survived but was horribly disfigured. . . . David [and] his mother . . . are not being told where David's father . . . is resettling, except that he will not be within 25 miles of them. . . . David is terrified. . . . "Do I deserve to be set free?" the father said in a letter to *The Los Angeles Times* last month, "No, it's an unforgiveable act." (p. A21)

These examples show that our criminal justice system has not improved very much, even though legislators have been trying hard to enact new laws to protect crime victims. A crime victim is still treated as a "nonperson" by the criminal justice system. The lawyers continue to play their adversary system games. Dangerous criminals are set free.

Victims of civil wrongdoings are in no better position. For example, a consumer may be entitled to a refund but may get nowhere despite numerous letters and phone calls to the vendor. In situations like this, the only feasible means of redress may be writing a letter to the local newspaper requesting intervention. But the time wasted and the frustration suffered can never be compensated. Likewise an automobile dealer can easily break a sales contract and simply refund the deposit. The consumer

would then have no damage to claim, even though the price of the car may be substantially higher when he orders a similar one from another dealer. I know by personal experience that the Better Business Bureau and the county consumers affairs department would not intervene, even though the dealer broke the contract solely because the model had become popular and he could sell the car to someone else for much more money.

Our legal system is fundamentally defective. Therefore knee-jerk reactions, patchwork, and the like cannot be very meaningful. What is needed is careful, thoroughgoing thinking, with new approaches and methodologies. Systems science and decision sciences have been applied to business and public management with some success. The same approach may be applied to the legal system, and the result may be a system that is simpler, more sensible, and more equitable.

CRIME, TORT, AND COMMON SENSE

A complete overhaul of our legal system would be very difficult. Significant improvement may be possible if we are willing to apply common sense and logic. As the renowned economist John Maynard Keynes observed (Hogan, 1981, p. 20), the problem seems to be that too often lawyers busy themselves making common sense illegal.

Crime and Tort

A crime, by definition, is an offense against the state or the public at large, whereas a tort is a civil wrong against an individual (other than a breach of contract). The objective of criminal law is the punishment of the offender. The penalty may be imprisonment, a fine payable to the state, or both (Forer, 1980, p. 26). But the victim is a nonperson and may serve only as a witness. The objective of tort law, on the other hand, is to compensate the victim for damages, both those suffered already and those expected to be

suffered in the future. This division of offenses into crime and tort seems not to be very sensible and may well be the root cause of victim injustice. Let us see why.

In reality, the state is a "nonperson." The state exists only in abstraction and cannot really be harmed, whereas people can suffer harm. For example, if someone evades income tax and is not punished, others may follow suit, and government revenues and programs would then be adversely affected. A government employee may be a victim if his or her job is lost. But the real victims are the people if the government is unable to function properly for lack of revenues. Further, the concept of the public at large is only vaguely understood, and the result is an obvious misclassification of crimes and torts. For example, drunken driving is a crime, whereas carelessly bumping into somebody's car and causing damage is a tort. In both cases, however, anybody who happens to be there may be harmed, and neither driver has a specific victim in mind. If the public at large means nonspecific persons, then both drunken driving and careless bumping should be classified as crimes. Similarly, it would be very difficult, if not impossible, to see why Mrs. Jean Harris, who killed her lover, Dr. Herman Tarnower, author of the Scarsdale diet, committed an offense against the public at large (Trilling, 1981, pp. 5–6). What she did was an offense against a very specific person. It would be absurd to contend that her offense constituted a threat against the public at large. It may be argued that punishing Mrs. Harris is actually a warning to all lovers in similar situations. A counterargument would be that law enforcement is always in the interest of the public. Thus requiring a tortfeasor to pay damages to the victim may also be viewed as a warning to would-be offenders and is in the public interest.

In general, for the sake of clarifying victimization, crimes and torts should be merged and then reclassified into, say, two broad categories of offenses: in the first group, those where the victims can be clearly identified, and in the second group, those whose effects on the victims may be insignificant or unknown to them. For example, a legislator may accept a bribe and then vote for a law

favoring the briber (Wolfgang, 1980, p. E21). The victims may be difficult to identify, and the effect on each of them may be minimal. Nevertheless, the effect on the society as a whole may be significant. If so, the state may then have to punish the offender in the interest of the public at large.

For offenses in the first proposed category (i.e., in which the victims are clearly identified), I suggest that the victims be the plaintiffs, either alone or jointly with the government. But legal assistance should always be available. If the government wants to prosecute the offenders to promote justice or the interest of the public at large, it should work with the victims because they have at least equal stakes in those lawsuits. Therefore, to ignore the victims and brand them nonpersons is plainly inappropriate.

Apprehension of Government

The prevailing concept *State v. Somebody* is the root cause of victim injustice. Why? First of all, as the victim is neither the state nor that somebody, he or she automatically becomes irrelevant. Furthermore, justice for the criminal becomes very important and can be promoted at the expense of the victim. The origin of this situation is as follows: Historically, only after the ruling monarchs became powerful was crime in England considered a public matter and an offense against the crown instead of an offense against the victim, as the people were subjects and owned by the monarch. Heavy fines were levied against criminals and became a good source of income for the nobility (Hyde, 1980, p. 60).

In a democracy, the need continues to protect the ordinary citizen from abuses of governmental power. In a recent article, former Chief Justice Warren E. Burger (1990, pp. 4-6) explained that, in the founding days of this new nation, people were apprehensive about the new "monster" national government. Many checks and balances therefore were written into the Constitution. When it came to governmental prosecution of offenders, the Framers of the Constitution worried about how arbitrary those

monarchs used to be. Consequently, our Founding Fathers emphasized due process of law, no cruel and unusual punishment, and so forth. They wanted to be certain that no innocent persons would suffer. This thinking is still with us. Therefore it is quite possible that, to some, fighting for criminal justice is almost like fighting against government oppression. It is quite possible that more criminal justice would mean less victim justice and vice versa. Therefore the right thing to do is to strike a balance between the two. I believe this may have been the reason that the National Institute of Justice in Washington, D.C., some ten years ago dropped its old name, National Institute of Criminal Justice. Justice only for criminals is not enough. There must be justice for all, victims as well as criminals:

Balance between criminal justice and victim justice may not be easy to achieve. What I propose is only the first step. If the victim of a crime can be clearly identified, then the crime is primarily an offense against the victim, not the state, and the victim must be given legal rights, comparable to those of the defendant. I propose a reversal of the order in present practice, so that the criminal prosecution follows a civil lawsuit. Common sense suggests that whoever suffers the most should get the first consideration. Thus Mrs. Harris (Trilling, 1981) should first be required to face a tort suit and pay compensation to Dr. Tarnower's heir, or to the state if there is none, and then face a criminal suit and be imprisoned as a warning to lovers in similar situations.

THE CONSTITUTION AND THE DOCTRINE OF STRICT CONSTRUCTION

The U.S. Constitution is often vague, so it requires interpretation. On the other hand, criminal laws based on the doctrine of strict construction of the Constitution are narrowly defined. Both vagueness and strictness can cause injustice. Again, common sense may provide remedies.

The Constitution

Former Chief Justice Warren E. Burger, in his article "The Right to Bear Arms" (1990), said the Second Amendment guarantees the right of the people to keep and bear arms. But he added that "the meaning of this clause cannot be understood except by looking to the purpose, the setting and the objectives of the draftsmen" (pp. 4, 6). The following is a summary of Mr. Burger's article:

1. People were apprehensive of the new "monster" national government and had a deep-seated fear of a "national" or "standing" army. The same first Congress that approved the right to keep and bear arms also limited the national army to 840 men. Congress then provided, "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Thus the need of a state militia was the basis of the "right" guaranteed. Americans remembered how monarchs used standing armies to oppress their ancestors in Europe. Against this background, the provision concerning firearms emerged in very simple terms, basing the right on the necessity for a "well-regulated militia," a state army.

2. Some have exploited these concerns, blurring sporting guns with all firearms. Many of the 3.5 million people living in the thirteen original colonies depended on wild game for food, and a good many of them required firearms for their presumed "defense" against the Indians, and later against the French and English. Americans have a right to defend their homes. Nor does anyone seriously question that the Constitution protects the rights of hunters to own and keep sporting guns for hunting game any more than anyone would challenge the right to own and keep fishing rods or to own automobiles. Today, to "keep and bear arms" for hunting is essentially a recreational activity and not an imperative of survival. "Saturday night specials" and machine guns are not recreational guns and surely are as much in need of regulation as motor vehicles.

3. The Constitution does not mention automobiles or motorboats, but the right to keep and own an automobile is beyond question, as is the right to license the vehicle and the driver. Even a bicycle and household dogs, in some places, must be registered.

Former Chief Justice Burger discussed regulating the ownership of firearms, which the American people must decide upon if the current mindless homicidal carnage is to be stopped and the "domestic tranquility" promised in the Constitution is to be preserved.

Thus, by reviewing history, Mr. Burger explained in simple terms why the U.S. Constitution guaranteed the right of the people to keep and bear arms. Mr. Burger pointed out:

1. People can have rights that are not foreseen or guaranteed by the Constitution.
2. Along with rights, people must be willing to accept responsibilities.
3. Individual freedom and the public good, such as "domestic tranquility," should be properly balanced. It is up to the people to decide how the balance is to be achieved.

The Framers of the Constitution wanted to be sure no one would become the victim of governmental oppression, not even the criminal. But the situation has changed greatly in two hundred years. Now the real victims have to worry about the criminals, and they deserve victim justice.

Criminal Statutes and the Doctrine of Strict Construction

Most crimes are rigidly defined, in terms of acts, tools, and objects, such as battery, armed robbery, and burglary. White-collar crime may be an exception. The doctrine of strict construction requires that any ambiguity in the interpretation of criminal statutes be resolved in favor of the accused (Low, Jeffries, and

Bonnie, 1986, p. 101). The rationale is that just what constitutes criminal conduct must be known in advance, so that nobody can be accused of committing a crime retroactively. There can be problems, for example:

1. Acts by themselves are often difficult to compare. Consequently, defining and measuring the seriousness of a crime in terms of acts can easily lead to incongruities. This may explain why street crimes are often considered very serious, though some may not be so. For example, stealing has a very bad connotation. Nonviolently stealing five dollars is a crime, and the offender may end up in jail. Yet if a doctor instructs his patient to come for another visit and charges an extra fifty dollars for it, when actually there is no need for the added visit, he is only "unethically" overcharging. Keeping patients waiting in the office for an hour or more, wasting their time, is not even considered wrongful. Perhaps this is why a patient is called "patient." However, if the consequences of an act were emphasized, it would become clear that the doctor's acts may cause more adverse effects and are therefore more serious offenses, all other things being equal.

2. Acts are infinite in variety. Consequently innumerable statutes have been enacted to define crimes in terms of acts, and new statutes are passed almost every day. Still it would not be difficult to find an act that by common sense is obviously unlawful and is not punishable under existing statutes. A well-known case is *McBoyle v. United States* (Low *et al.*, 1986, p. 103). Mr. McBoyle was first convicted of the interstate transportation of a stolen "motor vehicle," defined by law as including "an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails." But Mr. McBoyle had transported a stolen airplane. The U.S. Supreme Court ruled that the statute on stolen vehicles did not cover his case, and he was acquitted. Fourteen years later Congress amended the statute to cover stolen aircraft, defined to be "any contrivance now known or hereafter invented, used, or designed for navigation of or for flight in the air." Low *et al.* (1986, p. 104)

then raised the question whether a stolen boat is covered by the new statute.

3. The problem is still with us. As a matter of fact, as science and technology rapidly advance, statutes based on acts and tools can easily become obsolete. A typical example is the statutes on computer crime, which define the computer as an electronic device. Experts pointed out that the statutes on computer crime will be rendered inapplicable once a nonelectronic type of computer is invented. I support the commonsense view that a crime is a crime: it should not make any difference whether or not a computer is involved, and there is no need at all for new legislation exclusively for computer crime (see Chapter 14).

4. The father mentioned earlier, who set fire to his son, was jailed for six years and is now out on parole. He was convicted of attempted murder, arson, and other charges, and he received a maximum thirteen-year sentence. By definition, a murder conviction requires that the victim actually be killed. But the son survived, so the father is not a murderer. Thanks to our legal system, this young boy will suffer, physically and mentally, with little or no compensation, unless he initiates a civil lawsuit and wins. He will also live in fear that his father may repeat his earlier crime.

Thus neither the U.S. Constitution nor the criminal statutes pay much attention to the victims. Revisions and new approaches are in order, with a very important consideration being the sufferings of the victims. For example, if what happened to that young boy, David, had been given more weight, I believe his father would have been convicted of a murder, or an "almost" murder, with a more severe punishment than that for an attempted murder.

CRIMINAL JUSTICE AND VICTIM JUSTICE

What are criminal justice and victim justice? These are very old and difficult questions. I suggest a systems science answer, based on the so-called axiom-logical-inference approach. This means first introducing two axioms, then drawing certain logical

conclusions on how offenders and victims may be treated. These axioms define justice in a specific way without necessarily being universally acceptable. If they are accepted, then the conclusions will also be generally acceptable. Although the question of justice for offenders and victims in torts is not addressed in this chapter, it may be approached in a similar way.

Axiom I: From a society's viewpoint, an accused or a criminal is not more despicable than its other members, regardless of how *despicable* is defined. (He or she may not be less despicable either.)

Axiom II: If Member A of a society is not less despicable than Member B, then the society must not treat B better or worse than A.

Presumptive Sentencing

Should criminal justice adopt a scheme whereby a sentence would be fixed by a commission, based on certain factors and weights that the sentencing judge should consider and assign? Judge Lois G. Forer (1980, p. 115) did not agree with this approach. Her reasons are summarized as follows:

1. People [of the commission] who have never imposed a sentence, and who have spent little if any time with offenders, may not have the experience and understanding to make the sensitive decisions which will affect the lives of countless people whom they will never know.

2. Sophisticated statistical techniques are always reassuring. If only we are modern enough and scientific enough, the results would be unassailably objective. But in countless ordinary cases, the results are not fair simply because human behavior cannot be reduced to six, a dozen, or even a score of items and factors. Moreover, the factors are imprecise. (pp. 117, 125)

Judge Forer then discussed a number of real cases and showed that presumptive sentencing can be very unfair or even worse than common sense. My response would be that the presumptive sentencing scheme that Judge Forer criticized was not well designed. Furthermore, the legal system itself is defective. An example cited by Forer (1980, pp. 120–121) was a Mr. S, an innocent passerby and a victim of robbery. He broke his right arm and was hospitalized for two weeks and out of work for almost four months, but the sentence did not provide for any reparation. Improved sentencing formulas are now available (Malcolm, 1990, p. 110), and at least twenty-five states and the federal judicial system have adopted some form of formula sentencing. Can we have a perfect formula? Of course not. Should we give up the idea? I think a comparison with the income tax system can be enlightening. How many factors were considered when income tax laws were enacted? Can the complete financial picture of an individual be reduced to a score of items or factors? How much time have the tax law legislators spent with working people? Do they have the understanding of working people to make those sensitive decisions? The answers seem obvious. Income tax laws and many other laws are impersonal.

I think that few systems in any society pay much attention to individuals or are perfect, and that a society simply does not have the resources to do everything it would like to do 100 percent correctly. Therefore, based on the axioms, I would advocate the use of presumptive sentencing, with the exception of very serious cases, if it can save the cost of, and speed up, legal proceedings. However, to minimize injustice, carefully designed schemes are needed. This topic will be discussed in the next section. I suggest we pay less attention to and spend less money on the criminals, except for efforts at rehabilitation. Why? Victims and poor innocent people need and deserve assistance. If everybody cannot be taken care of simultaneously, then priority may and should be assigned to the victims and the law-abiding needy, at the expense of the criminals.

Self-Incrimination and the Fifth Amendment

I suggest that the U.S. Constitution be modified and reformulated as follows: In a criminal case, all relevant information and evidences must be promptly furnished. Otherwise heavier punishment (not cruel and unusual punishment, of course) should be imposed if guilt is proved by other means. The right to remain silent may be guaranteed but should not be encouraged; the choice should be up to the individual. That is, either be honest and tell the truth, or be prepared for the consequences (the Soviet legal system operates in a similar fashion). The reasons are:

1. Self-incrimination, to varying degrees, is often required in everyday life. A job applicant must furnish letters of recommendation, and some of them may well be unfavorable. An employee must submit a W2 form when an income tax return is filed. When one is applying for a driver's license, all physical defects must be revealed. These are examples of self-incrimination. If so, then the accused should be required to do the same because, by the axioms, the accused may not enjoy rights that ordinary citizens do not have. The right to choose may be exercised with consequences. I agree that "however lowly the suspect, . . . he is still a human being possessing certain rights" (Kamisar, 1986, p. A35). However, by the axioms, he or she may not have more rights than the rest of us. The possibility that an accused may be convicted and severely punished is irrelevant to the axioms.

2. Few if any rights are absolutely free. Free education is paid for by real estate taxes. Social security benefits come out of contributions paid during one's working years. Even welfare benefits are "repaid" later by taxes on the recipient's income once a job is secured. If a suspect chooses not to furnish the pertinent information, seeking the truth by other means may cost the society dearly. Hence, by the axioms, I think it is only fair to require a suspect to "pay," in one way or another, for invoking the Fifth Amendment.

3. Hiding the truth is, of course, not the same as lying, and I

would hesitate to say that one who hides the truth is "up to no good" (Hennessey, 1986, p. 22). Nevertheless, "not to be a witness against himself" strongly implies that the reason for remaining silent is self-interest and personal advantage (Taylor, 1986, p. E22). But this is not normally encouraged in everyday life, certainly not without limit or restraint. By the axioms, why should a suspect in a criminal case be an exception? I see no reason at all to view this type of privilege as a great landmark in a human's struggle to make himself or herself civilized (*New York Times*, 1986, p. A34).

If another amendment to the Constitution is needed to modify or replace the Fifth Amendment, I support it (Wander, 1986, p. E22). An overall review of the Fifth Amendment may be in order (Stevens, 1987, p. A1). Let us not forget that times have changed. Fighting for the right not to be a witness against oneself before an accusing monarch is one thing; hiding the truth to protect one's own interest in a democracy is an entirely different matter. It is unfair and an obstruction of justice.

The Death Penalty

Can the death penalty be justified in a civilized society? Opinions vary. Some believe in "execution, sometimes in a manner as painful or nearly as painful as that inflicted upon their victims" and believe that "punishment can exert its cathartic effect . . . if . . . observed by all" (Nisbet, 1982, p. E21). Others feel that the death penalty is uncivilized. A recent trend, however, favors the penalty (Oreskes, 1990, p. A16). In my analysis:

1. It may be possible to argue that the U.S. Constitution does not flatly rule out the penalty. The Fifth Amendment implies that one may be deprived of life with due process. The Eighth Amendment does not rule out the penalty, otherwise the Framers would probably have explicitly said so. By "cruel and unusual punishments," it is quite possible that they meant torture and the like, arbitrarily used by monarchs.

2. In a democracy, I think that the issue, like many equally

serious ones, can best be settled by an expression of the will of the people—perhaps through a referendum. If the referendum answer is yes, then the state becomes an administrator in any actual execution, carrying out the order of the people. The state then has no choice of its own, and no official is personally responsible for the execution.

3. Problems such as the fact that many more African-Americans have been executed, should be dealt with very seriously and on an urgent basis. However, such problems are separate issues.

4. My philosophy is somewhat different. I do not know whether the death penalty can deter crime, although a report such as "Poles Find Crime Replacing Police State" (Greenhouse, 1990) could be cited as a proof that punishment does deter crime. I am not sure whether we are a civilized society. But I do believe I have only one life and would like to live as long as I can. I like to buy all types of "insurance" to protect my life, and I am willing to pay for them, including giving up some rights, even if all my "investments" do not work. I also respect the choice of others. Therefore I propose that any citizen may state his or her choice by a "living will," requesting capital punishment if murdered without justification, provided that he or she agrees to the same punishment if found guilty of murder. In all cases, the choice of the victim shall prevail, unless otherwise specified in the will. There may be practical difficulties in implementation. But I certainly hope a bright-colored badge indicating my choice would one day discourage a would-be murderer. At any rate, my proposal can be justified by the idea that a victim's choice should be given some priority. In fact, by choosing the death penalty against the offender, a person actually gives up the possibility of getting away with a sentence of less than death in case he or she is found guilty of murder. Isn't that fair?

The stated axioms are only one possible approach to balancing the interests of the offenders, the victims, and ordinary people. I have no solutions for the general problem of criminal justice and victim justice.

SYSTEMS SCIENCE APPROACH TO JUSTICE

Systems science thinking can be applied to answering the question of what is an unlawful act.

Common sense says that, if you harm somebody, you may have committed an unlawful act. This proposition offers an approximate idea about unlawfulness but is too simplistic to supply a complete answer. Thus mildly spanking one's child is not unlawful, mainly because the benefit of discipline outweighs the physical pain. Beyond a certain limit, however, spanking could become child abuse, a crime. Thus a dividing line is needed. Limits on physical harm are relatively easy to set. This explains why it is not difficult to classify murder, battery, and so forth as unlawful. As things get more complicated, even physical harm may not be easy to assess. For example, discharging chemicals into a river is now unlawful, while selling cigarettes is still lawful.

To a victim, the harm inflicted is a very important consequence of victimization. But there are many other factors relevant to the determination of unlawfulness. The principle of legality and the doctrine of strict construction hold that all illegality must be spelled out in advance and that all ambiguities must be resolved in favor of the accused, so that nobody can be punished retroactively for committing a crime (Low *et al.*, 1986, pp. 33, 101). This approach may be a good idea, but in practice, it may have gone too far. John Maynard Keynes went further when he said, "I want [a lawyer] to tell me how to do what I think sensible, and above all, to devise means by which it will be lawful for me to go on being sensible in unforeseen conditions some years hence" (Hogan, 1981, p. 20). Keynes was apparently seeking a basis for distinguishing lawful from unlawful.

An Encyclopedia of Relevant Characteristics

The term *relevant characteristics* refers to all the factors relating to whether a certain act should be classified as unlawful, and if so, how serious it is. For example, instead of the use of a vague term

such as the *public at large*, careful consideration should be given to all those who are adversely affected, that is, the victims. This kind of analysis may improve victim justice: if a victim is a victim and never a "nonperson." There are five major categories of relevant characteristics for determining whether an act is a crime and, if so, the gravity of the crime:

The Offenders and Their Acts. Who has the responsibility for what act is very important in promoting justice for the offender, especially when there is more than one actor and one act. In a conspiracy, for example, the "boss" or the "leader" should have the most responsibility.

The Victims. Due consideration for victims is obviously very important to justice. In recent years, our society has shown great willingness to expand the consideration given to victims. Many who were excluded or ignored in the past are now given attention, for example, children who have been abused, women suffering from family violence, and minorities in racial discrimination cases. Some victims may be "invisible," such as those in tax evasion cases.

Effects or Consequences. There are numerous kinds of effects or consequences, including physical and mental harm, financial damages, and loss of time. The effects may be immediate or delayed, brief or long-lasting, extensive or intensive. From a victim's viewpoint, it is very important to identify all harmful effects. It is also possible to disagree about whether the victim has been harmed or benefited, for example, in euthanasia.

Personal Data and Relationships. Personal data, for all parties involved, include age, sex, physical condition, mental capacity, education, financial strength, occupation if employed, social status, and previous criminal records. Confucius, for example, believed that more stringent standards and severer punishments may be justified for the better-educated offenders and for those

with higher social status. Obviously not everybody would agree. The relationship between the offender and the victim, if any, may be by blood, friendship, acquaintanceship, employment, contract, citizenship, and so on.

Circumstance and History. *Circumstance* refers to the time and place of the offense; acts immediately before and after the offense, including thoughts and intentions; the options available; physical and mental status; conditions and happenings in the environment; and so on. An issue of great interest to the victim is the claim of temporary insanity by the offender. *History* refers to what happened in the past, including what the offender and the victim did to each other, and when and where. Battered women often have long histories of abuse. Also important is the history of the entire society. Causes of discrimination can be traced to the community or the entire society.

These listings and categories are tentative. An "encyclopedia" should be compiled of all conceivable relevant characteristics. While the final compilation may be difficult, if not impossible, an initial version may be prepared. Inclusion or exclusion should not reflect the value judgments, personal preferences, legal philosophies, and so on of the compilers. The sole consideration regarding individual entries should be whether they are of possible interest to the average user. The entries may be grouped into major categories and subcategories for easy reference. The initial version may be tested by legislators, judges, jurors, legal experts, and concerned citizens. Over a period of trials, there may be additions, deletions (of seldom-used entries), and revisions.

A TWO-PHASE DECISION PROCEDURE

A two-phase decision procedure provides a systematic and unified basis for (1) classifying acts, including acts of omission, into lawful and unlawful ones, and measuring the seriousness of an unlawful act and (2) deciding in a given case whether an

accused has committed an offense and how serious it is. The theoretical value of the procedure is in revising the existing laws and redefining unlawful acts. The practical value is more careful and hopefully more consistent verdicts and sentencing, hence improved justice.

Phase 1: Case Analysis

When a case is on trial, users of the proposed "encyclopedia," such as judges and jurors, may check off entries to determine what the respective answers are, such as who has the responsibility, who the victims are, what is the harm, and what are the circumstances. The advantages of having and using an "encyclopedia" are that (1) no important factors will be overlooked; (2) the check-offs can be carried out systematically; and (3) the same procedure applies to all cases. Checkoff lists, guidelines, and so on are useful simply because nobody can store in his or her mind all the items or factors that may be relevant. As Benjamin Franklin said, "When those difficult cases occur, they are difficult, chiefly because . . . all the reasons pro and con are not present to the mind at the same time" (Zeleny, 1982, p. 13).

Phase 2: Decision Making

At least two important questions must be answered:

1. Who should decide? Under the U.S. Constitution, the legislators write the laws. In reality, in this country many laws are written by the judiciary. I believe some change is needed. Professor Arthur Miller, in discussing the 1973 *Roe v. Wade* abortion decision, said, "The Supreme Court is not supposed to 'make' law. . . . Isn't it best for politically accountable officials, not unelected judges, to strike the balance between competing interests, particularly in an area in which emotions run high?" (Crovitz, 1982, p. 26; Miller, 1982, p. 264). I would go further: On major issues, the people should be the decision makers. In this electronic age, a referendum can easily be conducted. There may be debates, but

once the votes are cast, the issue is settled, as in the election of the president. People's judgments and choices are, of course, not perfect, as Judge Forer (1980, pp. 116–117) observed. But would people ever agree, for example, that a victim of crime should be treated as a nonperson? At any rate, in a democracy, we may have no choice but to let the people be the ultimate decision makers.

2. How should decisions be made? In a case on trial, Phase 1 would review all the relevant characteristics. To reach a decision on whether there is an offense and how serious it is, a quantitative approach would result in the previously mentioned presumptive sentencing, basically a formula that assigns weights to the various relevant characteristics and combines the results into a single measure of seriousness (Sellin and Wolfgang, 1978). A formula can reduce oversights and inconsistencies, but it can also cause inflexibility. Qualitative approaches may also be devised; one possibility is similar to the methods used by judges: First, determine the harm done; then adjust the seriousness based on aggravating and mitigating factors. To minimize possible oversights, the proposed "encyclopedia of relevant characteristics" should be very useful. To minimize inconsistencies, the judges may have to meet and reach some agreement on how to measure the seriousness of the harm, what the aggravating and mitigating factors are, and how much weight should be assigned to them. Thus some kind of formula or guideline may be indispensable. When decisions are made by individuals or small groups of judges, differences in opinions and judgments are inevitable (Sullivan, 1990a, p. B2).

There may be no definitive answer to the question: What is an offense or a crime? I offer only a basis for analyzing the relevant factors and drawing the line separating the lawful from the unlawful. Where the line should actually be drawn is up to the people to decide. In a case where the death penalty is a possibility, the people may also have to be called on to make the decision (see Sullivan, 1990a, p. B2.)

Although I have no answer to the general question, I do have a few suggestions for promoting victim justice:

1. The "total suffering" of the victim caused by the offender

must be given the utmost consideration. Thus the offense would be considered very serious, even if the victim, although suffering greatly, ultimately recovered.

2. If the intent is to inflict bodily injury, and the consequence is near death but the victim has recovered, intent to kill shall be assumed. This is comparable to the principle of strict liability in torts (Dobbs, 1985, p. 464).

3. Adolescence as a mitigating factor should depend on the seriousness of the offense. Thus a ten-year-old would be tried as an adult if he or she commits a murder. This idea is comparable to that of "adult activity" in torts (Emanuel, 1988, p. 70). All of these suggestions may well promote justice for victims like the New York City Central Park logger (Sullivan, 1990b, p. 1).

Concerning punishment, theoretically the same approach is applicable, as the punishment should be "proportional" to the seriousness of the offense. In practice, however, there are difficult problems. Should punishment be generally tough? What kinds of punishment? Should there be imprisonment for civil offenses also?

One may compare the procedures proposed here with that of the U.S. Sentencing Commission (1987). Theirs are basically working rules. My interest is in how to analyze acts to determine whether they should be classified as lawful or unlawful. I advocate unified and systematic considerations, believing that these promote consistency and ultimately more justice for both offenders and victims. Whatever the definition of justice, careful and overall consideration will help.

POSTSCRIPT

This proposed approach has wide applications. The foregoing ideas initially came from my research in ethics (Chu and Yablon, 1980, pp. 787-794; Chu, 1985, pp. 66-69). A unified theory of relevant characteristics is being developed for application to ethics, law, and management science.

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REFERENCES

- Burger, Warren E. (1990). "The Right to Bear Arms." *The Miami Herald Parade Magazine*, January 14, pp. 4-6.
- Chu, John T. (1985). "Invited session on decision sciences and ethics and values." *Proceedings of the Northeast AIDS*, March.
- Chu, John T., and Yablon, Marvin (1980). "Problem analysis of ethical and value issues in health care." *Systems Science in Health Care: 1*. New York: Pergamon Press.
- Crovitz, Gordon. (1982). "The Law as the Source of Discontent." *The Wall Street Journal*, March 24, p. 26.
- Dobbs, Dan B. (1985). *Torts and Compensation*. St. Paul, MN: West.
- Emanuel, Steven. (1988). *Torts*. Larchmont, NY: Emanuel Law Outlines.
- Forer, Lois G. (1980). *Criminals and Victims*. New York: Norton.
- Gest, Ted, and Sanoff, Alvin P. (1982). "U.S. Legal System: 'All sides want to hide the truth': A conversation with Alan M. Dershowitz." *U.S. News and World Report*, August 9, 93(6):62.
- Greenhouse, Steven. (1990). "Poles Find Crime Replacing Police State." *The New York Times*, March 4, p. L20.
- Hennessey, Walter S., Jr. (1986). "That Man Grant." *The New York Times*, December 14, p. 22.
- Hogan, Frank. (1981). "Keynes on Statesmen, Lawyers, and Love of Money." *The Wall Street Journal*, June 8, p. 20.
- Hyde, Margaret O. (1980). *Crime and Justice in Our Time*. New York: Franklin Watts.
- Kamisar, Yale. (1986). "The Miranda Case, 20 Years Later." *The New York Times*, June 11, p. A35.
- Low, Peter W., Jeffries, John Calvin, Jr., and Bonnie, Richard J. (1986). *Criminal Law* (2nd ed.). Mineola, NY: Foundation Press.
- Malcolm, Andrew W. (1990). "Sentencing Criminals: A Formula for Fairness." *The New York Times*, February 17, p. L10.
- Markman, Ronald, and Bosco, Dominick. (1989). *Alone with the Devil*. New York: Doubleday.

- Miller, Arthur R. (1982) *Miller's Court*. Boston: Houghton Mifflin.
- The New York Times*. (1986) "Pleading the Fifth Is No Crime." December 5, p. A21.
- The New York Times*. (1990) "Man Who Burned His Son in 1983 to Be Freed from California Jail." January 23, p. E22.
- Nisbet, Robert. (1982) "No End to the Process of Creating Victims." *The New York Times*, August 15, p. E21.
- Omang, Joanna. (1982) "Senate Unanimously Approves 'Right Bill' for Victims of Federal Crimes." *The Washington Post*, September 15, p. A3.
- Oreskes, Michael. (1990) "The Political Stampede on Execution." *The New York Times*, April 4, p. A16.
- Sellin, Thorsten, and Wolfgang, Marvin E. (1978) *The Measurement of Delinquency*. Montclair, NJ: Patterson Smith.
- Stevens, William K. (1987) "Constitution at 200: Pomp and Pondering." *The New York Times*, January 4, p. A1.
- Sullivan, Ronald. (1990a) "New Jersey's Death Penalty: Fair or Fake?" *The New York Times*, September 13, pp. B2-B3.
- Sullivan, Ronald. (1990b) "3 Youth Guilty of Rape and Assault of Jogger." *The New York Times*, August 19, pp. 1, 33.
- Taylor, Telford. (1986) "They Don't Give Medals for Pleading the Fifth." *The New York Times*, December 14, p. E22.
- Irilling, Diana. (1981) *Mrs. Harris*. New York: Harcourt Brace Jovanovich.
- U.S. Code. (1988) 1982 Edition, Supplement V 1987. General Index I-Z. Washington, DC: Government Printing Office.
- U.S. Sentencing Commission. (1987) *Sentencing Guidelines and Policy Statements*. Washington, DC: Government Printing Office.
- Wander, Myron. (1986) "A Waiver Is Needed." *The New York Times*, December 14, p. E22.
- West's Annotated California Codes. (1988) Penal Code, Section 447-680 "Rights of Victims and Witnesses of Crime." St. Paul, MN: West.
- Wolfgang, Marvin E. (1980) "Crime and Punishment." *The New York Times*, March 2, p. E21.
- Zeleny, Milan. (1982) *Multiple Criteria Decision Making*. New York: McGraw-Hill.

African-Americans, Crime Victimization, and Political Obligations

BILL LAWSON, PH.D.

INTRODUCTION: CRIME AND VIOLENCE IN AMERICA

More and more Americans fear becoming victims of a violent crime.¹ Their fears should not come as a surprise. The various news media repeatedly broadcast how crimes, particularly drug-related crimes, have filled the lives of many Americans with terror and misery. What intensifies the fear of being a victim of crime is the knowledge that many of these drug-related crimes are violent crimes. An individual not only worries about break-ins and petty thefts but also fears suffering serious bodily harm or death as the victim of a mindlessly violent crime committed to obtain money for illegal drugs.

Although fear of being a victim of crime is a stark reality of modern life, crime victimization is a particularly pressing problem for most African-Americans. These citizens have the most to fear because they often live in areas with high crime rates. It is a well-documented fact that, in the United States, members of some population groups are more likely to be victimized by violent crime than others. The crime victimization data to be presented

later will show that African-Americans, in particular, are more likely to be victims of a violent crime (e.g., aggravated assault, homicide, and forcible rape) than other members of American society. African-Americans are more likely to be robbed than whites or members of other races. Also there is some indication that African-Americans with some college training have a higher violent crime victimization rate than their white counterparts (U.S. Department of Justice, 1989, p. 3).

Although the crime victimization data suggest the relatively high current probability of African-Americans' being victims of violent crimes, the history of African-Americans in America depicts a violent history, both political and criminal, against African-Americans. If one of the roles of the government is the protection of its citizens and it fails to carry out this responsibility, what are the political obligations of that affected group? This chapter focuses on the question: How does crime victimization affect the political obligations of a group?

Before discussing the effects of crime victimization on political obligations, we must understand what it means to be politically obligated to the state. One popular method of explaining political obligations is to view membership in the state as a "social contract." Although no classical theorist of the social contract specifically mentions the obligations of African-Americans, there have been attempts to deduce the implications of such a theory for African-Americans, as discussed in a later section.

Two related questions are addressed here. First, can the fact that members of a particular group of citizens find themselves disproportionately the victims of crime weaken their political obligations to the state? That is, does the lack of governmental protection release unprotected groups from an obligation to obey certain laws or all laws, or even not to revolt? Second, if it is true that particular group members are disproportionately victims of crime, can the theory of the social contract help us to understand what their obligations to the state should be? The social-contract theory does not seem to indicate just what their obligations should be under these circumstances. Philosophical issues of wider im-

port inexorably seem to arise, issues such as the need to rethink the roles of crime and governmental protection in political theory, particularly in social-contract theory (Lawson, 1985).

SOCIAL-CONTRACT THEORY AND POLITICAL OBLIGATIONS

According to the theory of the social contract, the state should be thought of as coming into being when people who live in a "state of nature" (Hobbes, 1958) freely conclude a pact under which they form a civil society, the major characteristic of which is the establishment of a civil government. The state of nature is the presocietal condition of human existence, and it has been given various descriptions. For Hobbes, it was a condition of continual war. Life in the Hobbesian state of nature was "nasty, brutish and short" (p. 107).

For Locke (1976), on the other hand, it was a state of relative peace. There were, however, often conflicts over property rights. In both situations, the "state of nature lacked common laws, a known impartial judge, or executioner of violations of the laws of nature" (p. 71). People guided by reason realized that some sort of civil government was needed. They freely came together and formed the civil state. These free, autonomous individuals decided on the form of government and the amount of power the government should have. Thus government is based on the consent of the governed. By freely consenting to join with others in civil society, each is thought to be politically obligated to obey the dictates of the state.

The governmental authority is thus legitimate only because of the free consent of the governed. All contract theories agree to something like this free consent, but they do so for different reasons. Hobbes (1958) thought that the basic reason for entering into the pact was personal security. He reasoned that, if the person who ruled the state had power and authority to punish any

wrongdoer, the state would be in a position to protect an individual's life, limb, and personal property.

For Locke (1976), an individual joins the pact primarily because civil society makes property secure. Locke's state of nature lacked the "war of all against all" that Hobbes envisioned. Thus two important considerations arise from Locke and Hobbes. First, personal protection or benefits are the basic reasons for entering into the social contract. Second, the individual must freely consent to be a member of the pact for the authority of the government to be legitimate and hence for the rules set by that government to be widely obeyed with a minimum of coercion or oppression.

According to social-contract theory, political obligations arise when free, equal, and autonomous individuals come together to form a compact that they agree to obey the dictates of the state. By freely consenting to join with others in civil society, each is thought to be politically obligated to obey the dictates of the state. The state represents the civil mechanism that adjudicates property claims and keeps the peace by protecting citizens through the enforcement of laws.

AFRICAN-AMERICANS AND THE SOCIAL CONTRACT

The classical theories of the social contract did not specifically address the question of the political obligations of African-Americans. The following modern philosophers, however, have considered the impact and implications of social-contract theory on the political obligations of African-Americans: Harvey B. Natanson (1970-1971), Michael Walzer (1970), John Rawls (1971), and Larry Thomas (1975).

Rawls and Thomas see the social-contract model as helping us to understand the role of civil disobedience in political situations where the state is violating the social contract, for example, by not allowing African-Americans to participate in the political process (i.e., by placing restrictions on their participation in the electoral franchise).

Rawls believes that reciprocal political rights and obligations depend on the equality and justice of political arrangements. But the question of the existence of such justice should not, in his view, be left wholly to unguided intuitive judgments. He devised a procedure for deciding precisely what would be a just government or society worthy of consent. Rawls asks us to conduct a thought experiment to see what principles of justice we would choose if we, along with all other rational agents, were placed behind a "veil of ignorance" and were instructed to devise a set of principles for organizing society. The veil of ignorance would exclude knowledge of one's class position or social status, one's fortune in the distribution of natural assets and abilities, the nature of one's society at the present time, or one's individual conception of the good. This "ignorance condition" is supposed to ensure impartiality. As a result, none of us would have any special interest to defend, nor would we form alliances to adopt principles that would be of either advantage or disadvantage to a particular minority group. Rawls believes that the principles we would adopt would be just principles, because nobody would want to risk being in a disadvantaged position when the veil is removed. Because it must be supposed that the chooser behind a veil of ignorance would not select principles that would allow for his or her own possible oppression, we may conclude that the procedure would yield principles that are not unjust.

Although Rawls's veil of ignorance may well provide a method of telling us what kind of state we should consent to, it does not completely resolve the question of political obligations: Precisely what are the obligations of the oppressed in a state that is not yet just? Rawls attempts to resolve this problem by arguing that, in such cases, those groups are justified in protesting the actions of the state through civil disobedience. Rawls defines civil disobedience

as public, nonviolent, conscientious, yet political acts, contrary to law usually done with the aim of bringing about a change in the law or policies of government. By acting in this

way one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social cooperation among free and equal men are not being respected. (p. 364)

Those individuals who engage in civil disobedience appeal to the community's sense of justice. Rawls notes that he has

assumed that in a nearly just society there is a public acceptance of the same principles of justice. Fortunately, this assumption is stronger than necessary. There can, in fact, be considerable differences in citizens' conceptions of justice provided that these conceptions lead to similar political judgments. This is possible, since different premises can yield the same conclusion. In this case there exists what we may refer to as overlapping rather than strict consensus. (p. 387)

For Rawls, overlapping consensus "suffices for civil disobedience to be a reasonable and prudent form of political dissent" (p. 388). Rawls seems to think that civil disobedience acts as a reminder to the majority that the principles of justice are not being adhered to and that, once they are reminded, they will act accordingly.

It should be remembered, however, that Rawls's work is claimed to be merely an ideal theory. A practical question arises as to whether this theory can be applied to the real world. What happens, for instance, if the state does not change its policy toward a group after the group has engaged in acts of civil disobedience? In this regard, Larry Thomas (1975) has argued that a consequence of Rawls's theory of justice is that the right to revolt obtains for at least some of that society.

Thomas writes that "from the standpoint of justice as fairness, justice is infringed whenever citizens are denied the liberties of equal citizenship without sufficient reason. Whenever citizens have been so denied such liberties, they have the right to protest" (p. 246).

If these protests do not meet with any success, then these citizens (if they really can be called citizens) have the right to engage in nonviolent civil disobedience. Although civil disobe-

dience is contrary to the law, Thomas notes that, from the standpoint of justice as fairness, citizens have the right to engage in a mode of action contrary to the law even in a basically just constitutional democracy. It is important to remember that the natural duty of justice is the basic duty to support and promote arrangements that satisfy the "lexical ordering" (Rawls, 1971, p. 42) of the principles of justice, a process which entails the "natural duty to remove any injustices, beginning with the most grievous as identified by the extent of deviation from perfect justice" (p. 246). To be sure, precisely what means are justified to this end will depend on the character of the democratic regime and the depth of the injustices.

To illustrate his point, Thomas asks us to imagine "a constitutional democracy, call it *D*, which has a just constitution" (p. 247). In this democracy there is a class of citizens (minority citizens) who form a group that is relatively stable and easily identifiable, and who are, without sufficient reason, deliberately and systematically denied the liberties of equal citizenship. For some reason, either the legal system of *D* does not satisfy the constitution, or even if it does, those with positions of authority in *D* are causing particular legal obligations to go unfulfilled, or both. In other words, those in power are not performing their duties in accordance with the natural duties of justice. Now suppose the oppressed class of minority citizens have tried all forms of political appeals and have even resorted to nonviolent civil disobedience, but to no avail. The claim that *D* is basically unjust toward this oppressed class is indisputable. Thomas argues that the class of minority citizens in *D* then has the right to revolt (engage in civil disobedience). This right to revolt arises simply because "the natural duty of justice, the most important of all natural duties, entails the natural duty to remove injustices" (p. 248). Because this class of minority citizens have tried to *work* within the framework of the principles of justice, they have no recourse but to revolt to bring justice to *D*. Thomas further believes, however, that such a revolt should be well-ordered; that is, "there is no conceptual reason why a revolt must be ruthless and involve the needless loss of lives and destruction of property" (p. 249). History, unfor-

tunately, has shown that most revolts are not well ordered. This scenario, Thomas nonetheless thinks, is an application of the Rawlsian principles to the nonideal case.

The interesting thing about Thomas's interpretation of Rawls is that it tells us nothing new about the obligations, as opposed to the rights, of those groups of individuals who are oppressed. The right to revolt (civil disobedience) or to fight for one's rights is always retained as an important part of social-contract theory. Locke (1976), Rawls (1971), and Thomas (1975) seem concerned only with the denial of political rights. Thus civil disobedience is thought to be a justified response to the denial of political rights. What happens, however, when the government fails to protect the lives and property of its African-American citizens?

Harvey B. Natanson (1970-1971) has examined the implications of the Lockean concept of contract theory for African-Americans and has concluded that it might at first appear that, as citizens of the United States, they ought to obey the laws. But it is an easily verifiable fact that some African-Americans are not, and have never been, accorded equal governmental protection of their inalienable rights to life, liberty, and property (Higginbotham, 1978). Thus Natanson writes:

Since they have never received the protection of the government, it follows that the Negroes in question are not parties to the contract, for it is the acceptance of governmental protective services which defines contract membership. And it is not that these Negroes refuse to enter the agreement—quite the contrary, they are for the most part extremely willing to give their consent, to accept government protection. They are excluded from contract membership because they have not been offered the service available to the majority. In other words, there is no contract because it was never tendered. (p. 38-39)

Natanson believes this situation leads to two conclusions: First, because they are not genuine citizens, but inhabitants of a state of nature, these African-Americans must look, not to the government, but only to themselves for protection of their inalienable

rights. Second, within the framework of social-contract theory and its view of legal obligation, it cannot be held that these excluded African-Americans ought to obey the law. Although these conclusions have been ignored by some, they were not lost on, or unnoticed by, Malcolm X and other nationalistic African-American philosophers.

I have argued elsewhere that Natanson's conclusions are questionable because he fails to take into consideration (1) that the Fourteenth Amendment to the U.S. Constitution established that African-Americans are indeed citizens; (2) that all African-Americans understand what it means to be a citizen; and (3) that, if they were not citizens, they would be stateless beings (Lawson, 1989). Although I agree with Natanson that governmental protection is important, his argument turns on the questionable premise that the lack of protection has prevented African-Americans from becoming citizens.

The existence of any political obligation, at least in the above versions of social-contract theory, thus presupposes that the political oppression of African-Americans is not total. But where there is total oppression—that is, where there is not even a theoretical recognition of members of the minority as citizens—there is simply no political obligation to the state. The slave, for example, has no political obligation to the political system to which the master owes allegiance, nor to the political decisions made by that system. The slave has had no opportunity to participate in the decision-making processes.

It is, however, still consistent with the foregoing view that there remains a *moral* obligation even for a completely oppressed minority to obey at least some of the laws of the state, even though such a minority has absolutely no opportunity for any political participation. Other things being equal, for example, even an oppressed minority ought to obey laws against murder, but here the obligation would be created by the inherent wrongness of murder itself. On the other hand, it is difficult to imagine the removal of such oppression without violence, including homicide, but remember Thomas's notion of a well-ordered revolt of minimal violence.

THE WEAKENED POLITICAL OBLIGATIONS OF AFRICAN-AMERICANS TO THE STATE

The theoretically interesting and troublesome kinds of situations lie where minorities are recognized as citizens and are accorded some minimal number of rights, but they still receive fewer benefits from the state than other citizens. It is here that the quantitative question of political obligation becomes difficult to answer. Michael Walzer (1970) does attempt to address the issue of the obligations of citizens who do not receive all of the benefits of state membership. These citizens are unconstitutionally deprived of an equal distribution of the political and social benefits of state membership. Walzer holds, however, that a "so-called" excluded "Negro" is still a citizen of the state even though he may

count for less than his fellow, sometimes for a great deal less, when it comes to the protection of life, liberty, property, and welfare, and he acts with less effect. But he is not entirely unprotected, else he would not be a citizen in the legal sense, and he can join in political activity though his path is hard. (p. 226)

Walzer thinks that, although the members of this minority represent an oppressed part of the citizenry, they are "formally free and equal" (p. 68). They are free to join with other citizens to push for the redress of their grievances, and as long as the system allows them to organize politically and to "fight" for equal status, and indeed opens up, they are obligated to the state. Walzer, however, claims that, as they push for their equal status, they are nevertheless not required to obey every single law, or to pay every tax, or even to defend the state. He writes:-

These are the obligations of free and equal citizens and also, perhaps, of men who freely choose not to be free and equal citizens, who do not ask but receive all other benefits of the political community. (p. 69)

Thus, Walzer would conclude that, as long as the state does not take measures to make members of this group truly equal, their obligation to the state is weakened. One cannot be expected to consent completely to a state in which one does not receive all of the benefits, particularly if this political arrangement is not designed to benefit all concerned. Walzer believes that the system ultimately will open and include members of the oppressed as fully free and equal members. He thinks that past events (political and social) show that, if members of the oppressed group strive for equality, then the system will open up and evolve into a just political arrangement. The oppressed (now the formerly oppressed) will then also have the same, or at least nearly the same, obligations as those citizens who were free and treated fairly from the beginning. But unless and until they are treated as truly equal citizens, they have "fewer" obligations than those citizens who are, in fact, accorded full benefits of citizenship.

Even Walzer's notion that they have "fewer" political obligations is unclear. If a group is unprotected to the point where, as a practical matter, it cannot exercise any rights of citizenship, its political obligations are significantly reduced (civil disobedience), if not completely obliterated (revolt).

However, neither Walzer's nor Rawls's position helps us to understand or resolve the problem of deciding what political obligations remain for members of a group that receives all the rights of citizens (e.g., they can vote, and they can move freely about their community) and yet are not equally protected from violent crime. That is, their chances of being victims of crime are much higher than those of other members of the state, and this higher rate of victimization is caused by no reason other than their being members of a racial minority.

URBAN AFRICAN-AMERICANS AND CRIME VICTIMIZATION RATES

It is a well-documented fact that, in America, members of some population groups are more likely to be victimized by

violent crime than others. In many urban areas, the efforts of the police are thought by those residents to be ineffective in protecting citizens from the criminal element. Some areas of many cities are like urban battlegrounds. "Whole sections of urban America are being written off as anarchic badlands, places where cops fear to go and acknowledge: 'This is Beirut, U.S.A.''" (Moore, 1989, p. 29A). In Washington, D.C., the violent crime (e.g., murder) rate is so high that there are calls for deploying the National Guard to protect citizens (Will, 1989). There are several cities—such as Philadelphia and New Orleans—with violent crime rates similar to those in Washington D.C.²

In its summary of crime victimization, the U.S. Department of Justice (1989) reported that African-Americans were victims of violent crime at a "higher rate than whites or members of other minority groups" (p. 3). The rate for African-Americans was 39.6 per thousand as opposed to 27.3 for white Americans and 24.6 for other ethnic groups (U.S. Department of Justice, 1987, p. 3; see also Fingerhut and Kleinman, 1990). For both violent and personal theft crimes, the rate of victimization was highest for central-city residents. For personal crimes of violence, the rates of victimization were 40.3 per thousand for central cities and 23 per thousand for areas outside central cities. Overall the robbery victimization rates were still higher in central cities. The assault victimization rates also were higher in central cities. The rates were 79.6 per thousand for central cities and 69 per thousand for areas outside central cities. The assault victimization rates as well were higher in central cities (29 vs. 18.8).

Households headed by African-Americans had significantly higher victimization rates for all three major household crimes (196 vs. 135). Based on the number of vehicles owned, white Americans were victims of motor vehicle theft at a lower rate than African-Americans or members of other minority groups. The rate of victimization for burglary was generally higher for African-American households than for white Americans, regardless of annual family income. African-American households of low income (less than \$15,000) had higher larceny rates than low-income

white American households. In motor vehicle theft, African-American households with incomes over \$30,000 had higher rates than white American households in the same income category (37.3 vs. 16.6). There were no significant differences in household-larceny or motor-vehicle-theft victimization rates between African-American renters and owners (Lamb, 1981). For personal crimes, central-city African-American households had the higher rates of crime. The Department of Justice data point out very clearly that African-American urban residents are more often victims of crime—violent or otherwise. Two important points: First, the empirical findings of this annual survey have been constant over time. Second, as noted in the report by the U.S. Department of Justice (1987):

Annual victimization rates alone do not convey the full impact of crime as it affects people. No one would express his or her concern by saying, "I am terribly afraid of being mugged between January and December of this year." People are worried about the possibility that at some time in their lives they will be robbed or raped or assaulted, or their homes will be burglarized. (p. 1)

In America, we regard our sanctions in criminal law as being deterrents, and we look on our law enforcement agencies as being protective agencies. We believe that the legal system is supposed to ensure that an individual may go peacefully about his or her business without criminal interference. Many Americans living in urban areas, however, cannot go peacefully about their business. Individuals in urban areas live in fear caused by personal victimization or by the victimization of friends, neighbors, or relatives. It is the same fear that has caused the residents of these areas to turn their houses into prisons, in which they attempt to lock themselves for protection from crime (Gest, 1989).

The majority of the citizens of urban communities are neither criminals nor involved in crime. Yet these individuals, who are often members of racial or ethnic minorities, frequently find

themselves at the mercy of the criminal element. Members of these communities feel that the state is not protecting them.³

However, no discussion of crime would be complete without at least some mention of "black-on-black crime." Some theorists may feel that black-on-black crime goes to the heart of the question of crime victimization. What are the root causes of black-on-black crime? The answer to this question would go beyond the scope of this chapter. It would possibly involve developing a crime victimization theory that addresses the issue of governmental failure to incorporate African-Americans fully into the social, economic, and political fabric of American life. This is just one of the explanations given for the advent of black-on-black crime.⁴ One point seems clear, however: In the Lockean model of the state, no person is to be penalized for her or his membership in a minority group. If it is the job of the state to protect individual citizens, then it is the state's job to ensure that the laws are obeyed, that criminals are punished, and that citizens are protected no matter what their race.

Given the disparities in the incidence of violent crimes in the African-American communities and other communities, one may properly ask what options are open to those individuals who must live their lives knowing that the government is not protecting them as it protects all other citizens. If one of the primary reasons for joining and remaining a member of the state is protection of one's life and property, and that protection is not given, then the claim that one is a full and equal member of the state is seriously undermined. The lack of protection undermines one's status as a full member of the state.

CONCLUSION: THE SOCIAL CONTRACT AND CRIME VICTIMIZATION

There is an intellectual prejudice that tends to cloud discussions like this one. Many social-contract theorists appear to assume that modern democracy can come near to the Lockean ideal

merely by extending to *all* the people in a modern mass state, Locke's ideal of a contract of equal partners—on paper. But in these mass states, for historical reasons, the partners are not politically equal individuals in the beginning, *and they do not become so merely by legislation on paper that merely proclaims equality*. Rawls (1971) and Walzer (1970) appear to accept the social-contract model. They believe that the state will eventually live up to its part of the contract, so that all oppressed groups will become full and equal members of the state. It is assumed that equal physical protection for each citizen is a given with the formation of civil society (Hobbes, 1958; Locke, 1976).

On the other hand, the social-contract model does not preclude the reality of the *state's* not fulfilling its part of the contract, for example, not providing equal protection for African-Americans from violent crime. Within the framework of social-contract theory, it would appear that some African-Americans are citizens without the benefits of equal physical protection. One might believe that they would have, at least, weaker political obligations. However, the use of social-contract theory to justify less binding political obligations for African-Americans remains, at best, somewhat dubious.

The theory does not indicate how to judge whether a particular government is moving quickly enough to provide equal protection. All citizens may agree that certain areas and groups of citizens are more likely to be victims of crime and may concede that it is also impossible to bring about the changes in the social and political structure of the society in a short time in order to remedy the situation. But how do we resolve conflicts caused by differing beliefs about the speed at which the government should move to protect African-Americans?

It is evident that the state is not going to view in the same way as African-Americans its treatment of African-Americans and its speed of movement to a society in which all citizens receive the same or nearly the same basic protection. The state may express the opinion that it is doing all that it can do to resolve the crime problem with all deliberate speed. Many African-Americans,

however, may well proclaim that the state is acting too slowly or not at all to prevent crime in their neighborhoods (Lawson, 1990). The conflict caused by differing beliefs about the government's speed to protect a group is not easily resolved. What is to stop *any* group from claiming in exasperation that it suffers from political injustices that weaken, or even completely absolve it from, all political obligations?

The government's pointing out that one has political rights seems not to be enough to override concerns about one's physical protection. The rate of violent crime victimization of African-Americans appears to be a clear and significant indication of the unequal condition of at least some, if not most, African-Americans. Although the ability to participate in the political process is an important aspect of state membership, if one is not physically protected the right to the political franchise seems hollow. When physical protection is not given and the lack of protection impedes a group from going about its daily existence without fear of crime victimization, is this situation a violation of the social contract?

Of course, the government will claim that the terms of the social contract are being honored. The government may even allow that there may exist just claims against the government. In the United States, the government can point to the period when African-Americans were denied equal access to public facilities and to the electoral franchise as examples of such just claims. Social-contract theorists can say that the use of civil disobedience to bring about social and political changes shows that the social-contract theory works. However, the fact that the state fails to protect a segment of its population from violent crime victimization still presents a challenge for social-contract theory in terms of political obligations.

If, indeed, the claim that African-Americans are disproportionately victims of crime because of deliberate governmental inaction is true, should this lack of protection be seen as continued political oppression? If crime victimization is a residue of the history of unequal social and political rights of African-Americans and is indeed caused by continued deliberate inaction of the

government, do African-Americans have a proportionately weakened obligation to the state?

Those political theorists who support social-contract theory may need to rethink and rework the political obligation part of the theory. This reworking should be done with particular attention to the significance of *crime victimization* and *governmental protection*.

NOTES

1. For example, a recent survey in Minneapolis-St. Paul revealed that crime and drug-related violence were the number one concern of residents of the Twin Cities. This is not surprising, given the rise in drug-related crimes in most American cities. (See *Star Tribune*, 1989, p. 5 Be.)
2. See *The New York Times*, 1989, p. 22.
3. In a Gallup Report, when asked, "In general do you think the police in your community do a good, fair or poor job against crime," 60 percent of whites versus 39 percent of African-Americans answered good. (*Gallup Report*, 1989, p. 8).
4. For a comprehensive review of theories that attempt to explain black-on-black crime, see Oliver, 1990.

REFERENCES

- Fingerhut, Lois A., and Kleinman, Joel C. (1990). "International and Interstate Comparisons of Homicide Among Young Males." *Journal of the American Medical Association*, 263(24):3292-3295, June 27.
- Gallup Report*, Report Nos. 282-283. Princeton, NJ: The Gallup Poll, March-April 1989, p. 8.
- Gest, Ted. (1989). "Victims of Crime." *U.S. News & World Report*, July 31, pp. 16-25.
- Higginbotham, A. Leon. (1978). *In the Matter of Color*. New York: Oxford University Press.
- Hobbes, Thomas. (1958). *Leviathan*. Indianapolis: Bobbs-Merrill, Library of Liberal Arts.

- Lamb, R. (1981). "Non-Physical Attacks on Blacks." In L. P. Brown (Ed.), *Violent Crime: Who Are the Victims?* Landover, MD: National Organization of Black Law Enforcement Executives.
- Lawson, Bill. (1985). "Individuals and Groups in the American Democracy: Group Interest and Civil Rights." *Logos*, 6.
- Lawson, Bill. (1989). "Locke and the Legal Obligation of Black Americans." *Public Affairs Quarterly*, 3(4).
- Lawson, Bill. (1990). "Crime, Minorities and Social Contract." *Criminal Justice Ethics*, 9(2).
- Locke, John. (1976). *The Second Treatise of Government*. Indianapolis: Bobbs-Merrill, Library of Liberal Arts.
- Moore, Thomas. (1989). "Dead Zones." *U.S. News and World Report*, April 10, pp. 20-32.
- Natanson, Harvey B. (1970-1971). "Locke and Hume: Bearing on the Legal Obligation of the Negro." *Journal of Value Inquiry*, 5, 35-43.
- New York Times*. (1989). "Violent Crimes Increase by 5.5% For 1988. Establishing a Record," August 13, p. 22.
- Oliver, William. (1990). *Violent Confrontation between Black Males in Bathroom Settings*. Unpublished dissertation, State University of New York at Albany.
- Rawls, John. (1971). *A Theory of Justice*. Cambridge: Harvard University Press.
- Siberman, Charles E. (1978). *Criminal Violence, Criminal Justice*. New York: Random House.
- Star Tribune*. (1989). February 21, p. 5 B. Minneapolis-St. Paul.
- Thomas, Larry. (1975). "To a Theory of Justice: An Epilogue." *The Philosophical Forum*, 6, p. 244-253.
- U.S. Department of Justice. (1987). *Lifetime Likelihood of Victimization*. Bureau of Justice Statistics. Technical Report NCJ-104274. March Washington, DC.
- U.S. Department of Justice. (1989). *Criminal Victimization in the United States*. Office of Justice Programs. Bureau of Justice Statistics. A National Crime Survey Report NCJ-115524. June, Depository 087. Washington, DC.
- Walzer, Michael. (1970). *Obligations*. Cambridge: Harvard University Press.
- Will, George E. (1989). "Military Patrols Won't Solve Crime Problems in Nation's Capital." *The Washington Post*. April. Reprinted in *Star Tribune* (MN, Minneapolis-St. Paul) April 9, 1989, p. 29A.

B. INDIVIDUAL VICTIMS

When a man loses his health, then he first begins to take care of it.

JOSH BILLINGS
(pseudonym of HENRY WHEELER SHAW, 1818–1885)

He who has health has hope, and he who has hope has everything.

ARAB PROVERB

For my part, I have ever believed, and do now know, that there are witches.

THOMAS BROWNE (1605–1682)

The punishment of a criminal is an example to the rabble; but every decent man is concerned if an innocent person is condemned.

JEAN DE LA BRUYÈRE (1645–1696)

Upon this hint I spake:
She lov'd me for the dangers I had pass'd,
And I lov'd her that she did pity them.
This only is the witchcraft I have us'd.

WILLIAM SHAKESPEARE (1564–1616) (*Othello*)

The Rights of Child Abuse Victims

Philosophical Problems

MARIE-LOUISE FRIQUEGNON, PH.D.,
AND WILLAVENE WOLF, PH.D.

INTRODUCTION: CHILD'S NEED TO BE WITH PARENTS VERSUS NEED TO BE PROTECTED FROM PARENTAL ABUSE

Consider two generally accepted and intrinsically plausible principles: (1) children have basic needs for food, shelter, protection, and affection—all of which their parents are usually in the best position to satisfy; and (2) children need to be protected from serious abuse by their parents and other adults. The question arises whether these two principles are always compatible, and what should be done if and when they are not.

We shall argue that children's needs are often in conflict; for example, the need to be protected from harm and the need to remain with parents whom they love in spite of receiving abuse at their hands. The criminal justice system faces an anomaly here. Parents should be punished for crimes of child abuse; yet the usual

penalties might also, and even more grievously, injure the children by depriving them of parental caring.

MODIFIED RIGHT OF THE ABUSED CHILD TO CHOOSE TO REMAIN WITH ABUSIVE PARENTS

Studies of heinous child abuse indicate that many cases involve a projection of the parent's self in relation to his or her own parents. An abusive parent often relives his or her own childhood experiences of mistreatment at the hands of an abusing parent. Many abused children later identify their own children with themselves as children.

Often, abused children come to accept their painful role, perhaps sensing that they are thereby satisfying a deep need of their parents (Fishbach, 1980). The situation is analogous to a sadomasochistic husband-wife relationship. The law normally does not forcibly separate a married couple, one of whom is constantly abused by the other but prefers nevertheless to remain with that other. Yet, often, a child's choice to remain with abusive parents may not seem to society to be sufficiently rational or voluntary to be similarly respected. The same considerations that mitigate or nullify the criminal responsibility of children below a given age also work against according them full freedom of choice. Society would seem to be right to insist, where feasible, that parents and children learn to accommodate one another. Let us consider some institutional procedures by which this accommodation might be accomplished, as well as a semilegal framework to which children can appeal, either on their own or through surrogates, in cases where the relationship between the parents and the child has deteriorated hopelessly.

Among those who advocate improved conditions for children, there is considerable confusion about the philosophical grounds for an abused child's demands on society. Some claim that the state has an obligation to protect children because it has a duty to enable children to become useful citizens. Others argue

that abused children should be protected because the rights of such children are being violated by their parents, and because it is among the functions of the state to defend individual rights. The first group appeals to the tradition of community control over families, and the second appeals to the Lockean doctrine of natural rights. This problem is further complicated by the pioneer tradition, which resisted community control over the family, thus allowing family control to prevail. Within the family, the father's authority tended to dominate, so other individuals' rights were generally ignored.

Obviously the Lockean doctrine cannot be applied mechanically, and without modification, to young children. Two-year-olds can hardly be said to have the right to vote or to keep and bear arms. But although these and other liberty rights do not apply to very young children, there are other kinds of rights, particularly "claim rights," that do apply. These "claim rights," as Hohfeld (1964) called them, arise out of the obligations of both parents and society to care for children's needs. But claim rights and liberty rights of children have an inverse covariation. As children's dependency and needs decrease in urgency and hence their claim rights subside, their liberty rights to freedom of action naturally increase. A normal fourteen-year-old has the right to cross a street alone and thus has lost the claim right to expect someone to lead him or her across by the hand. Although no precise lines can be drawn as to when children must be granted particular liberty rights, it seems reasonable that they be made to correspond with the individual's emotional, cognitive, and moral development.

Our current methods of dealing with children stem from three conflicting traditions: community rights, family rights, and individual rights. To return to absolute community control over children would be to involve the state in establishing one institution after another to protect children from their families, with consequent bureaucratization and all its attendant problems. Not only is institutionalization usually undesirable in itself, but it also represents a regressive historical step from the freedom that the family won from community interference in the eighteenth century.

Writers such as William Ruddick (1979) and Ferdinand Schoeman (1978) have argued that family privacy, including parental control, is the lesser of two evils, in that removing children from their families is likely to be a leap from the frying pan into the fire. Schoeman maintains that the intimacy between parents and child is so "precious" that it justifies a hands-off policy for the community except in the most extreme cases of crippling physical abuse.

Certainly society should leave reasonably protective families alone, even when some of their practices are questionable. But in the light of increasing reports of abusive families (U.S. Department of Health and Human Services, 1988), it is time to consider seriously a modified individual-rights approach. Such an approach presents difficulties, of course, but with suitable modifications and incorporation of the best features of the two rival traditions of family hegemony and community control, it may turn out to be a decided improvement over present practices.

Consider a hypothetical case of a family of five children and one parent, the mother, living in abject poverty. Although the mother loves her children, she is being driven to distraction by their uncontrollable behavior, and she insults and beats them in a vain effort to coerce obedience. What is to be done?

If the children are put into foster care or into an institution, their chances of a reasonably happy life become very uncertain (Pelton, 1981). Although the cycle of abuse would be broken, a new one might very well develop in the foster home or in the state institution. On the other hand, society should not allow the abusive treatment of the children by the mother to continue unabated. Few would insist on the absolute rights of parents and of family privacy at this point. Therefore let us consider what a modified children's rights approach can offer.

It is generally agreed that children usually benefit from remaining on familiar ground, so an attempt should be made to hold this family together. One preventive approach cited as being the strongest model available is to train volunteers and match them with high-risk mothers to provide education and support on discipline, coping with stress, and the use of community re-

sources (Bales, 1987). Thus single mothers could be matched, for example, with other single mothers who have had similar experiences or with mother surrogates who teach them how to manage the home. Another effective method for keeping the family together is the use of homebuilders who are highly skilled persons, usually working intensively with two or three families at a time. Because professional social workers at the master's level are used, this approach is very expensive, but it is effective. Hopefully, the two methods described above would relieve the initially abusive mother of the burden she has previously found intolerable, and thus she would have less need to be abusive and more opportunity to relax and enjoy the more positive features of family life. Contrary to the belief (Schoeman, 1978) that family privacy and affectionate intimacy go together, the "invasion" of this family's privacy by outside assistants seems likely to strengthen the intimate ties of affection between the members of the family. Self-help groups have also been highly successful in some instances. According to Gonzales-Ramos and Goldstein (1989), existing research data support the efficacy of Parents Anonymous groups, in contrast to group therapy, in reducing the propensity toward future abuse and neglect.

Usually children prefer to remain with their parents, even abusive ones, especially when the parents make an effort to improve, and the children's wishes should be given careful consideration. But suppose, in our hypothetical family, the children do not want to remain with their mother, even under improved conditions. Again, at least some consideration should be given to their preferences. It is not at all clear, however, that the mother's right to keep her children should take precedence over the wishes of the children. In such cases, foster care or adoptive homes appear to be the best route.

Although the vast majority of severely abused children would prefer to stay with their families, a considerable number would not. Recently attempts have been made to give legal recognition to the custodial choices of children. One example is a Connecticut law that allows older children to sue for emancipation when

capable of self-support. Some states now require the consent of children in both custody and adoption cases. When children cannot cope with their natural parents but can cope with substitutes, it is sensible to use such alternative resources to provide the child with some kind of family environment. The child's living with a close relative or friend may be an ideal solution to the problem because this might provide some continuity with school and friends. As Margaret Mead observed in *Coming of Age in Samoa* (1961), the hard-working children of Samoan parents, when ill treated, frequently go to live with other relatives, a rearrangement often acceptable to all concerned. But in modern America, the large distances between relatives as well as the reluctance of parents to part with their children, or the reluctance of relatives to accept them, may make such an arrangement difficult or impossible.

Another solution, when litigation proves to be too disruptive and family rearrangements are impossible, may be a model of arbitration such as that used in employer-employee relationships. In such cases, the employer and the employee do prefer to remain together or wish to continue a relationship of mutually satisfying dimensions. Through the arbitration of an objective third party, changes might be made in the family that would lead to more satisfactory living relationships for the parent and the child.

We have been proposing a way of viewing the problems of child rearing that combines three American traditions: the community control of family life characteristic of colonial Puritanism, the pioneer tradition of family unity and privacy, and the Lockean individual rights tradition. These three traditions are currently in conflict, particularly in the area of child advocacy. Previously the problem has been seen solely as a conflict between family rights and the right of the state to interfere on the child's behalf. To reset the problem in the context of children's rights thus seems desirable.

Most rights of children are claim rights stemming from the obligations of parents and society to satisfy the needs engendered by dependency. The parents are, for good reasons, expected to

meet most of these needs, and for the same good reasons, children usually prefer to live with their parents. But when there is serious child abuse in a family, society must draw the parents and the children into a network of procedures that are designed to protect the claim rights of the children as well as the liberty rights of the parents.

A child's claim rights must be identified developmentally in relation to his or her liberty rights. If the guardian of a child's liberty rights is justified in limiting them for the sake of the child's and others' health and safety, then, when no such purpose is likely to be served, the child should enjoy, like any adult, maximum liberty compatible with the liberty of others. These rights of the child are, of course, limited by the equal rights of his or her parents.

Family integrity and a child's right not to be abused thus need not be incompatible. When children's rights are viewed in the aspect of claim rights primarily and liberty rights secondarily, it can be seen that the need of abused children to remain in their families may be important enough to call for extensive efforts, involving arbitration, educational training, counseling, and the assignment of homemakers, to help a family stay together and solve their problems collectively, while at the same time protecting the children against severe parental abuse. Adopting these procedures would preserve the best features of three American traditions: community responsibilities, family privacy, and individual rights.

CONCLUSION

These proposals are at best a cure for the symptoms. But considering the reported extraordinary widespread increase in severe child abuse in our society, it is premature at this point for anyone to claim that he or she has the answer to what the causes are. Cross-cultural studies should be conducted to determine if some societies have little abuse and, if so, what pertinent differ-

ences exist between those societies and our own. The differences may lead to proposals for changes that could be made in our society to lessen the parental abuse of children. Societies with little abuse may reflect more respectful treatment of older people. If this should prove to be the case, the lack of abuse may be attributable to the tendency for people to behave consistently with the way they are viewed and treated. It is possible that if parents are expected to be wise, just, and compassionate, and to be respected for these qualities, they will tend to act accordingly. Our society's idealization of youth and its denigration of older people may actually cause resentment in older people as well as anger and hostility in the young. This line of inquiry, along with others, may identify the major factors responsible for the cycles of child abuse and may offer better solutions to the problem.

REFERENCES

- Bales, J. (1987, June). "Child Abuse Prevention: States Try Trust Funds." *The American Psychological Association Monitor*, 18(198).
- Fishbach, S. (1980). "Child Abuse and the Dynamics of Human Aggression and Violence." In G. Gerbner, C. Ross, and E. Zigler (Eds.), *Child Abuse: An Agenda for Action*, pp. 48-60. New York: Oxford University Press.
- Gonzales-Ramos, G., and Goldstein, E. (1989). "Child Maltreatment: An Overview." In S. Ehrenkranz, E. Goldstein, L. Goodman, and J. Seinfeld (Eds.), *Clinical Social Work with Maltreated Children and Their Families: An Introduction to Practice*, pp. 3-20. New York: New York University Press.
- Hohfeld, W. N. (1964). *Fundamental Legal Conceptions as Applied to Judicial Reasoning*. New Haven and London: Yale University Press.
- Mead, M. (1961). *Coming of Age in Samoa*. New York: Morrow.
- Pelton, L. H. (1981). *The Social Context of Child Abuse and Neglect*. New York: Human Sciences Press.
- Ruddick, W. (1979). "Parents and Life Prospects." In O. O'Neill and W. Ruddick (Eds.), *Having Children*, pp. 123-139. New York: Oxford University Press.

- Schoeman, F. (1978). *Rights of Children, Rights of Parents and the Moral Basis of the Family*. Paper read to the New Jersey Regional Philosophical Association.
- U.S. Department of Health and Human Services. (1988). *Study of National Incidence and Prevalence of Child Abuse and Neglect*. Washington, DC: National Center on Child Abuse and Neglect.

Victimology and Blaming the Victim

The Case of Rape

SUSAN R. PETERSON, M.A.

SEX CRIMES AND VICTIMOLOGY THEORY

Women victims of sex crimes are perhaps the most maligned of all crime victims. Even those who concede that rape is an inexcusable offense nonetheless continue to place some blame on the victim. Women are reluctant to report rapes because of the recriminations, social rejection, ostracism, and vindictive consequences that frequently befall them. Unfortunately, it is not only society at large that is responsible for treating victims in this fashion; even family and friends are likely to have strong, negative reactions to the victim. The 1989 case of the rape of an investment banker, the Central Park Jogger (*New York Times*, 1991), by a gang of youths illustrates the difficulty of getting a conviction even in clear cases involving heinous circumstances and serious bodily harm. Most of us believe that we would behave fairly and compassionately when confronted with a victim of the crime of rape. Therapeutic and crisis center experience, however, indicates that such fair treatment is rare. Even political liberals and many feminists have been

known to be harsh and skeptical when dealing with rape victims, particularly when the victims are from lower socioeconomic backgrounds, or in cases of "date rape" (Gibbs, 1991). It is particularly disturbing that among those attributing blame to sex crime victims are otherwise morally sensitive and honest people.¹

How can this insensitivity be explained? No doubt part of the problem lies in sexist attitudes and the myths surrounding rape in general.² The solution to this problem lies in public education, heightened awareness of the criminal sexist abuse of women, and improved responsivity on the part of law enforcement officials and medical professionals. Since the early 1980s, there has been much progress in all of these areas, though there is much work to be done in the 1990s.

A NEW THEORY IN CRIMINOLOGY

Now, moreover, there is a new source of justification for blaming crime victims for the sins of the offenders. There is a new school of thought in academic criminology circles called *criminological victimology*.³ The focus of this theory is said to be the analysis of the role of the victim in crime occurrence. The term *role* here is perhaps purposefully open-ended; logically (by definition) there can be no violent crime against a person without that person; that is, the victim. Criminological victimology appears to assume that victims and offenders share equally as causal agents in crime generation. Now, there is an obvious, indeed tautological, sense in which victims of crime cause that crime: bank robbery cannot occur without banks, rape without victims, burglary without houses or offices, arson without buildings, and so forth. For some reason, criminological victimologists have not thought to extend their sociological research to such topics as the existence of buildings as a causal source of arson. This omission is probably attributable to an implicit assumption that both offender and victim must be human agents, both of whose choices of activities and purposive actions have "brought about," in some sense, a resulting

crime. However, this assumption is not entirely valid, for there are cases of crime in which the victim's sole problem was being in the wrong place at the wrong time. In such a case, it is literally nothing that the victim did that caused the crime; rather, it was something that the offender did, randomly choosing victims who happened to be there.

Noticeably lacking in the new criminological victimology are any persuasive arguments that the logic involved in this new theory is sound. The theory is simply presented as a scientific and statistical part of sociological theory. Its champions imply that empirical verification of the theory is not only possible, but available and, indeed, forthcoming. In fact, however, all such claims appear to be specious. Let us examine criminological victimology further by analyzing briefly three of its implicit claims and assumptions.

THREE CLAIMS ARE CHALLENGED

Claim 1: Because every crime (of violence against the person) involves the action of more than one person, and because persons are individually responsible for their actions, the actions of both criminals and their victims contribute to crimes. Therefore, both victims and offenders contribute to crime.

There are several problems with this proffered proof. Let us forestall the interesting but excessively complex questions that philosophers have uncovered concerning precisely what constitutes an "action." For our purposes, a very commonsense approach to action will do: let us include both active and passive actions, for example, walking down the street, standing on the corner, putting on certain clothes, pointing a gun at someone, and forcibly imposing one's unwanted sexual desires on someone else. The first problem we note with Claim 1 is that it implies that offenders and victims contribute *equally* to a particular crime. This implication violates all of our commonsense and moral notions about equal contributions to blameworthy actions. If Jones points

a gun at Smith, a random passerby, and demands Smith's money, Jones is robbing Smith. Smith's presence there contributes to the robbery incident itself, because if he weren't there, it could not happen, at least to him. However, this is the purely tautological formulation that "For every violent crime against the person, there is the person perpetrating the crime and the victim against whom it is perpetrated." There is no new information in the formulation, and it is only potentially interesting when it is rephrased as "Criminals and victims both contribute to crimes," which in turn misstates the tautological (undeniably but trivially true) formulation by attributing equal blameworthiness and causal efficacy to both agents. What action is Smith committing that contributes to the crime? Walking down the street with a wallet in his pocket? If so, we must conclude that, as walking down a street with a wallet in one's pocket is an action contributing to crime and as people ought not to contribute to crime, therefore they ought not to walk down streets with wallets in their pockets. Would anyone agree with this conclusion? I think not (although some people claim that one ought not to do so at certain times, on certain streets, and with perhaps too large a wallet).

To be robbable does not, in the eyes of the law and of morality alike, constitute "contributing to crime." After all, we are all robbable, and it is the offender's decision to rob, not the existence of robbable persons, that brings about the crime. Houses containing valuable goods are burglarizable; without such houses, burglary would not be possible. Does it follow that no one ought to have a house containing valuable goods? At best, criminological victimologists have come up with a counterfactual proposition that "Robberies can occur only if there is a robbable person," or that "Without the presence of the victim, crimes against the person cannot occur." There is nothing wrong with this claim; however, it is not the claim that these criminological victimologists want to make.

Claim 2: Because certain circumstances are more conducive to certain crimes than others, and because both victims and criminals are responsible for creating circumstances, both victims and criminals are

responsible for promoting crimes by creating those circumstances. Therefore, both victims and criminals are responsible for creating circumstances conducive to crime.

Circumstances clearly exist in every instance of crime, by definition. Such circumstances are not always, however, directly created by any of the agents involved in the crime. The existence of a public park allows crimes to take place there, but the park's existence resulted from quite another set of persons' actions. This passive, "environmental" approach to crime falsely implies that criminal intent actually plays merely a small role in crime incidence and that the environment enabling crimes to occur is actually at fault. But it is silly to say that the existence of buildings encourages arson, that pedestrians with wallets encourage robbery, and that women's very existence encourages nonconsensual sex with them. Again, criminological victimologists seem to be left with nothing more than a counterfactual conditional: "If it weren't for circumstances allowing for the free interaction of people, including violent crimes against the person, such crimes could not take place; therefore circumstances allowing crime contribute to crime." As it is not logically possible, let alone factually probable, to rid the world and human existence of such circumstances, the point made by the criminological victimologists is vacuous.

Claim 3: If there is a high statistical correlation between certain factors involved in certain types of crime and in the frequency of these crimes, then those factors contribute causally to the crime. Therefore, statistics concerning the factual details about crimes indicate that both victims and criminals are responsible for crime incidents.

Statistics are very popular with criminological victimologists. The relatively high statistical occurrence of alcohol consumption and violent crime seems to allow one to draw the further inference that alcohol consumption *causes* violent crime. However, statistical correlations themselves do not constitute a justified leap to causal inference. Lightning and thunder were once thought to cause the other (sometimes one way, sometimes the other) but are now seen both to be caused simultaneously by the discharge of an electri-

cally charged cloud. Smith walking down the street with a wallet in his pocket does not *cause* the robber to rob him, though his action *enables* this action. Statistically, there is a 100 percent correlation between the existence of an offender and the existence of a victim in each crime against the person! This claim not only fails to prove that *victims cause crimes* but merely reiterates the tautological definition of what constitutes a violent crime against the person. Again, it is totally vacuous and amounts to no more than a counterfactual conditional with which no one would argue, and which is uninteresting to criminologists.

Finally, the most severe argument against criminological victimology is that it attributes moral blame to innocent persons for no stronger reasons than flawed scientific method, inflated values of sociological significance given to statistical data, and the (not surprising) discovery that it takes two to make a robbery or rape. It does take two, but one is exploited, harmed, and innocently victimized, and the other is responsible for a crime not only against society but also against that individual person—the victim. Criminological victimology is a specious, pseudoscientific fad in sociological and criminological academic circles that should be quashed before it does what it accuses victims of doing: actually contributing to crime.

NOTES

1. Many of the sources for these generalized remarks are based on personal experience gained in teaching "Criminology: The Case of Rape" at the State University of New York at Old Westbury, as well as in founding and directing a rape crisis center in Nassau County on Long Island, New York. My work at this center involved training volunteer staff in crisis intervention, family counseling, and legal support services. In addition, see Peterson (1977).
2. Some of these myths include the false beliefs that women secretly wish to be raped, that any woman out walking on her own must be asking for trouble, and that men succumb to overwhelming sexual

urges that cause rape (rather than sadistic motives involving overpowering a weaker victim). See the references listed for this chapter.

3. See Hindelang (1978), Karmen (1990), Shafer (1977), and Senderey (1977).

REFERENCES

- Amir, Menachem. (1967). *Patterns in Forcible Rape*. Philadelphia: University of Pennsylvania Press.
- Brownmiller, Susan. (1975). *Against Our Will*. New York: Simon & Schuster.
- Burgess, Ann W., and Holmstrom, Lynda L. (1974). "Rape Trauma Syndrome." *American Journal of Psychiatry*, 131(9):981-986.
- Connell, Noreen, and Wilson, Cassandra. (1974). *Rape: The First Source Book for Women*. New York: New American Library.
- Gebhard, Paul H., Gagnon, John H., Pomeroy, Wardell B., and Christenson, Cornelia V. (1965). *Sex Offenders: An Analysis of Types*. New York: Harper & Row.
- Gibbs, Nancy. (1991). "When Is It Rape?" *Time*, June 3, pp. 48-55.
- Gigeroff, A., and Mohr, J. (1965). "A Study of Male Sexual Offenders." *Canada's Mental Health*, 13, 3.
- Griffin, Susan. (1971, September). "Rape: The All-American Crime." *Ramparts Magazine*, 10(3):26-35.
- Hindelang, Michael J. (1978). *Victims of Personal Crimes: An Empirical Foundation for a Theory of Personal Victimization*. Cambridge, MA: Ballinger.
- Karmen, Andrew. (1990). *Crime Victims: An Introduction to Victimology*. Monterey, CA: Brooks/Cole.
- MacDonald, John M. (1971). *Rape Offenders and Their Victims*. Springfield, IL: Thomas.
- New York Times*. (1991). "Central Park Jogger Trial," March 14, p. B4.
- Peterson, Susan R. (1977). "Coercion and Rape: The State as a Male Protection Racket." In Mary Vetterling-Broggin, Frederick A. Ellison, and John English (Eds.), *Feminism and Philosophy*, pp. 360-371. Totowa, NJ: Rowman and Allanheld.
- Senderey, Drapkin. (1977). *Victimology*. Lexington, MA: Lexington Books.
- Shafer, Stephen. (1977). *The Victim and His Criminal: A Study in Functional Responsibility*. Reston, VA: Reston Publishing.

Victims in Seventeenth-Century Witchcraft Trials

ALBERT G. HESS, PH.D.

INTRODUCTION

Since time immemorial, humans have explained events—either fortunate or unfortunate—as being caused by witchcraft. These explanations have provided seemingly rational “causes” for such events at times when better explanations have been unavailable. Personal misfortunes in particular have often been interpreted in this way, and frequently malevolent neighbors or other personal enemies have then been labeled as the responsible witches.

Witches, for our purposes, are persons who do mainly harm (“black witches”) or mainly good (“white witches”) by the manipulation of supernatural forces. They also are persons who, through such forces, apparently perform acts contrary to the laws of nature, such as flying in the air and being simultaneously in two places.

There are few studies that deal specifically with historical witchcraft “victims.” The term *victim* should be understood here strictly in its victimological sense, that is, as applying only to the person who allegedly suffers damage to his or her body or property by an act of (“black”) witchery. It is not uncommon in

witchcraft literature to use the term *victim* for others, particularly for the witches. This usage is understandable because innocent witches were often arrested, cruelly tortured, unjustly convicted, and made to die horrible deaths (see Geis, 1982). However, this usage can be confusing and therefore will be avoided here.

What is now known as the Great Witch Hunt extended approximately from the fifteenth through the seventeenth centuries. The spreading and intensification of witch trials during this hunt were encouraged by the spreading of a theological view that considered all witchcraft, both black and white, as having originated with the Devil and therefore as heretical, that is, as being a denial of the true God and the Christian religion. Also, the concomitant change in criminal court practices, from accusatory to inquisitory procedures, created favorable conditions for mass prosecutions and convictions on charges of witchcraft (Flade, 1902). Moreover, medical doctors of the period hypothesized that unexplainable "diseases had an unnatural or supernatural cause and were probably the result of intervention by the Devil" (Estes, 1983). Thus suspicion of witchcraft proliferated.

In the late seventeenth century, the Great Witch Hunt began to diminish. More scientific explanations for illness and catastrophes had become available by then, and the new spirit of the Enlightenment required explanations that conformed to known laws of nature. Demonological interpretations became less acceptable. Besides, Protestant Pietism and Catholic quietism found better ways to deal with witches than burning them (Cohen, 1975).

THE TRIAL RECORDS AND PROCEDURES OF TWO WITCHCRAFT TRIALS IN TRENTHORST, GERMANY

Court records (Jensen, 1956) from about 1612 to 1665 in the manorial court of a small village, Trenthorst (now part of Westerau-Trenthorst), in Holstein, Germany, form the basis for much of the following discussion. Jurisdiction over Trenthorst was in the hands of the Wetke family, whose jurisdiction also extended over

several other villages. It included the power to inflict capital punishment.

Inquisitorial procedure had generally become the rule in criminal trials even before 1612. In spite of all its cruelty as seen from a modern viewpoint, the *Constitutio Criminalis Carolina* (*Carolina*, 1532), the penal code under Emperor Charles V's reign in which the judge *ex officio* questioned the witnesses and provided further proofs—in contrast to the older “accusatory” procedure, in which it was the duty of the opposing parties to prove the evidence—stipulated certain evidentiary requirements and limitations on the use of cruel punishments and torture. However, because of the general fear of supernatural powers at work in witch trials, procedural guarantees were often disregarded. One may say for many German witch trials of the seventeenth century that, once a person had become a defendant, he or she was very likely doomed.

A relatively early local witchcraft trial took place in about 1612–1613. Originally, the trial was directed only against Laurenz Nuppenou, but he denounced several women during the trial proceedings and accused them of practicing witchcraft. Three of them thus became defendants at the trial, which will be designated here as the Nuppenou *et al.* trial (Hess, 1990).

A second trial, in 1665, had at the outset only one defendant, Gretge Steffens; but soon another woman, Elssche Prahlen, was added selectively from among three denounced women (so-called *Besagte*). Unfortunately, we do not know in either proceeding why certain persons from among the *Besagte* were chosen to stand trial and others were not. This trial, the Steffens–Prahlen trial (Hess, 1990), together with the above-mentioned Nuppenou *et al.* trial, will be referred to here as the “two trials.”

QUALITY OF EVIDENCE IN WITCH TRIALS

Far-reaching skepticism toward all witch “confessions” appears advisable today. Some writers distinguish between “confes-

sions" under torture and those without torture. Any such distinction clearly appears meaningless, simply because in the seventeenth century all defendants in witch trials knew they would be tortured if they did not confess. During the proceedings, this knowledge was reinforced by oral threats and the *Territion*, during which torture instruments were exhibited to the defendants and were even attached to their bodies. Understandably, this technique was enough to extort many false "confessions." Although references to "voluntary" confessions are not infrequently found in witch trial records, they usually indicate merely that the frightened subject's admissions were voluntarily repeated by him or her after the threat of torture had been suspended (Kieckhefer, 1976, pp. 27-28).

WITCHCRAFT VICTIMOLOGICAL OBSERVATIONS

The study of the history of witchcraft obviously does not presuppose a belief in the supernatural. In the view of this writer and most scientists today, the supernatural phenomena and their human manipulation of which the defendants were accused have never been proved to exist (Cohen, 1975, p. 258) and are almost universally rejected. Regardless of whether the supernatural aspect of witchery has ever been proved, certain persons may well have fantasized about meeting with a figure who they thought was the Devil, about flying in the air, about having sexual relations with the Devil, about attending a witches' sabbath, or about bewitching individuals and their property.

Then, as now, some people probably did indeed attempt to practice witchcraft. In particular, among folk healers it was customary not only to use medicines and therapy for curing ills but also to conjure supernatural power through incantations that often included religious expressions and gestures. As Cohen (1975) points out, it is only a small step from "white" witchcraft to practicing the "black" variety. It is even conceivable that attempts to commit *maleficium* (malicious acts intended to harm persons or

property) led to success; for example, a curse calculated to render a man impotent and communicated to him as such may have become a self-fulfilling prophecy and may indeed have caused sexual difficulties.

The "criminals" and "victims" were what they were solely by artificial labeling. It is true that most of the victims in the two trials realistically experienced substantial losses or suffering, but according to our understanding, these harms were caused by natural instead of supernatural forces and events.

VICTIMLESS WITCH CRIMES

It is customary nowadays to define as victimless crimes only the so-called consensual ones (Glaser, 1974; Schur, 1971, p. 144), and this definition may indeed be adequate for most purposes. Today, for example, even a supplier of known illegal services or goods generally furnishes them to a consumer at the latter's request and consent. Such a consumer may or may not commit a criminal act by voluntarily accepting the services or goods, depending on the law in effect at the time and place. Modern examples of such crimes are the illegal interactions between drug trafficker and drug user or between prostitute and client.

Criminal statutes may also criminalize acts of which there are no specific consumers or targets as such. These acts may be termed *impersonal victimless crimes*. For example, the mere creation of a perceived hazard is punishable as an impersonal victimless crime, such as carrying and, sometimes, concealing a weapon, leaving the car key in a motor vehicle, and driving under the influence of alcohol.

Blasphemy, an offense that is still contained in some statutes, is another example of a crime that does not palpably victimize human beings.¹ Heresy, or dissent from an official religious dogma, is now almost universally considered a breach of only ecclesiastic rules and not of public penal law. In the past, however, heresy was held to be one of the most heinous offenses. The most

frequently alleged crimes of heresy were victimless, both in the two witch trials previously mentioned and in many other witchcraft trials of the Great Witch Hunt period. Such crimes consisted mainly of diabolic acts, for example, the conclusion of a pact and sexual intercourse with the Devil.

In the two trials, more than 50 percent of the crimes alleged were victimless, only thirty-seven of the seventy-seven offenses had victims. The fact that so many offenses fell into the category of the impersonal victimless crime of heresy shows the importance given to heresy by theologians and jurists, including those who conducted the interrogations.

Among these witchcraft offenses, there was only one type of consensual victimless crime: *raden*, *böten*, and *segnen* ("advising," "praying," and "blessing"), that is, the curing activities of the folk healers, who used not only physical means but also appeals to supernatural forces through gesture and the spoken word. There were three such cases (5 percent) in the sample. Not surprisingly, *raden*, *böten*, and *segnen* may also have included activities other than healing, such as divining, banning of ghosts, and counter-witchcraft.

Raden, *böten*, and *segnen* appear in an ambiguous manner in our records. Such folk healing was widely practiced and, it appears, generally approved of by the rural population, who hardly considered it a crime. Indeed it may have fulfilled an indispensable function for them. Although human and veterinary medicine had already been developed elsewhere (e.g., by blacksmiths in the stables of princes and military units, Cohen, 1975), the Holstein peasants probably had little access to such skilled medical or veterinary help and therefore turned to folk healers. The witnesses in the Gretge Steffens trial (c. 1665, Hess, 1992) described—as a normal activity and without fear of being themselves prosecuted for witchcraft—how they frequented practitioners of *raden*, *böten*, and *segnen*. In particular, they spoke of how they required Elssche Prahlen to heal their animals. Her healing was about the only activity Elssche Prahlen admitted freely and without threat of torture at her very first interrogation, that is, at a time when she

still denied categorically any involvement in witchcraft proper. She apparently believed that this healing constituted a lawful activity. However, her admission was promptly held against her. She was told that what she had already admitted constituted witchcraft, and she was threatened with torture. This threat made her decide to confess to all alleged witchcraft crimes so that torture would become unnecessary.

Although folk healing appears only relatively rarely in the sample, the true significance of this consensual victimless witch crime perhaps lies elsewhere: *raden*, *böten*, and *segenen* turned easily into a crime *with* a victim because, especially when the cure was unsuccessful, the victim often suspected that the healer had used witchcraft.

WITCH CRIMES WITH VICTIMS

The two trials mentioned twenty-six witchcraft offenders and thirty-five victims of *maleficia*,² that is, acts with real individual victims. The offenders included not only the six defendants, but also all the *Besagte* and a few other persons listed in the records as witches, for example, teachers of witchcraft or persons already executed elsewhere for witchcraft.

There were only ten instances in which acts against a person were allegedly attempted or successfully committed. The other offenses were directed against property, consisting mostly of livestock (farm animals). In one case, an orchard was allegedly bewitched so that it would render a meager harvest.

In that period, most European witch trial defendants were women. Of the twenty-six defendants in the two trials, only three were male (12 percent). As to the thirty-five victims, the proportion was reversed: there were twenty-seven men (77 percent) and six women (17 percent), plus two cases in which the gender is unknown (6 percent). A simple explanation for the large percentage of male victims is that most property was owned by men.

SOCIAL CLASS OF VICTIMS

The victims belonged to either the nobility or the common-folk, but there were no offenders among the former group. The number of nobility victims thus appears to have been relatively high compared to commoners: seven noble persons (21 percent) compared to twenty-seven commoners (79 percent), roughly a proportion of 1:4.³ No data are available on the ratio of nobility to common people in the population of Holstein, but there was usually only one noble family to a village or even to several villages. The Wetke territory comprised seven villages.⁴

Close kinships between witches and victims are sometimes suggested by their names: five victims had the family name of Steffens and three of Meins, the maiden name of defendant Elssche Prahlen, two of them her brothers. Both women in the Steffens-Prahlen trial were brought to trial by their relatives: Steffens by her husband, Heinrich, whose cattle she confessed to have killed, and Prahlen by her sick brother, Gossel Meins, whose illness she had allegedly worsened.

DEFINING WITCHERY ACTS AND WITCHES

Court action against witches was often not a quick, spontaneous reaction to a single event. Almost all the defendants confessed to having practiced witchcraft continuously for many years (four to forty) before being brought to trial, for example, Grettge Hoeppenens confessed to four years; Laurenz Nuppenou to ten years; Gretge Steffens to thirty years; and Elssche Prahlen to forty years.

Regardless of the truth of the alleged facts to which the accused witches confessed, most of the defendants had long-standing reputations as witches. Assuming that bewitching supernatural forces do not exist, then witchcraft as a crime exists only by way of imaginative definition. First, the causation of certain events is ascribed to supernatural powers. Then, certain

persons are imputed to be witches for having allegedly manipulated these powers and having committed the crime. Witch crime and its criminals obtained their social reality merely by the labeling process, a process which has been widely discussed for modern crimes (e.g., Becker, 1963; Lemert, 1951; Schur, 1971). Occasionally, labeling theory has also been used in historical studies of crime (Erikson, 1966). By contrast, when a little old lady is hit over the head by a bunch of young toughs who take away her purse, it is virtually impossible to say that the event is not a crime in an absolute sense.

One aspect of labeling theory that appears victimologically relevant is the question: Who, in a particular case, first defined a certain act as an act of witchcraft and a certain person as the witch who committed this act? Often the definer was the same in both instances, but not always. One of the Wetke witnesses, for example, suspected that one of his animals had been killed by witchcraft and then used a diviner to identify the witch.

Along with the broadening of the Great Witch Hunt, the scope of witch offenses widened considerably. Originally, it had been generally limited to the *maleficia*, as a rule excluding "white" magic. Later, however, witchcraft became heresy, and the impersonal victimless crimes dominated. A certain split developed in the beliefs of the general populace. The new intellectual idea of witchcraft may not have strongly entered into the minds of the common people, who continued to see it as mainly limited to *maleficia* (Horsley, 1979; Kieckhefer, 1976; Thomas, 1971). The population at large, to be sure, was also aware of the other alleged activities of witches, such as the witches' sabbath. When peasants complained to the authorities about a certain person's witcheries, it was not because they suspected her to have flown to a sabbath or to have had sex with the Devil. Almost always, the triggering event was the fact that a horse or cow owned by the complainer had died inexplicably and perhaps unexpectedly, or that a human being had similarly died. Nevertheless, as noted above, there were more victimless crimes than *maleficia*. It has been suggested that the confessions to impersonal victimless witch crimes were put,

by the learned interrogators, into the mouths of the defendants, who then confessed to fantastic stories under torture or threat of torture (Cohen, 1975, p. 254). These interrogators thus became the definers, and not unlike many modern prosecutors, they used discretion. For example, when an unaccused witness admitted consulting a healer, they respected the folkways and did not make an accusation against that person. However, when one defendant was interrogated, his involvements in *raden*, *boten*, and *segenen* were interpreted as witchcraft in accordance with the intellectual concept appropriate to his social class status.

A *maleficium* was defined by the victim most often when the victim was a commoner. In the Nuppenou *et al.* and the Steffens-Prahlen trials, the accusers and the defendants were commoners and were intimately acquainted. Often, in other trials, they were neighbors with great opportunities for hypnosislike influences.

MALEFICIA AGAINST NOBLES

As suggested above, in the cases of *maleficia* against nobility, relatively more offenses were directed against the person, though crimes against property of the nobility were by no means absent. There were more attempted than completed crimes, and relatively large numbers of offenses had allegedly been committed long before the trial. The attempts sometimes did not succeed for strange reasons, for example, because the victims had taken another road than that on which the bewitched materials had been strewn, or because they had walked not *on* the bewitched path, but *alongside* it: "Laurentz Nuppenou confesses that he" and three others wanted to harm a nobleman (Juncker) and a noblewoman (Lady) "by means of bewitched herbs. They all strewed herbs on the path to the *Spiker* (granary). . . . The Juncker went over the herbs, but the Lady whom he led by the hand, walked on the side of the path. Thus, she was not harmed, but the nobleman suffered slightly. (Nuppenou Trial, 7)" (Hess, 1992).

One victim was also reported to have fallen only "slightly sick." The unreality of such situations suggests that the interrogators themselves, possibly to impress their lords, invented some of these imaginative *maleficia* allegedly committed against the nobility.

FROM SUSPICION TO ACCUSATION

From an act of witchcraft to the lodging of a complaint, Macfarlane (1970) distinguished two stages: (1) the presence of some tension or anxiety or unexplained phenomenon and (2) the directing of energy into certain channels.

It may be useful to attempt breaking down these stages further: (1) property loss or damage, or bodily injury or illness (i.e., the crime) occurred; (2) the victim could not explain the harmful effect of the crime; and (3) the victim concluded that someone had bewitched him or her.

Often the victim or someone else (e.g., a diviner) selected a person to accuse of the witchery. The accused was usually a woman and maybe a neighbor—an enemy or a healer. More often, it was necessary that a larger population share the labeling and believe the person to be a witch. Indeed, each of the defendants may have had about six enemies among his or her neighbors.

However, the process did not end here. In most cases, official action against a witch was promoted by more than hostility between individuals. Commonly, these additional steps occurred: (4) the victim shared his or her suspicions with other sufferers of unexplainable harm; (5) they, too, then explained their misfortunes as being caused by witchcraft and identified the same person as the witch; (6) they communicated their suspicions to still more victims of unexplainable harm, and they all suspected the same person of witchcraft; (7) finally, a person, usually one of the victims, became a "moral entrepreneur" (Becker, 1963) who found the state of affairs intolerable and complained about the witch to

the proper authority; and (8) this complaint set in motion the criminal justice system against the suspected witch.

One would expect that, from Step 4 onward, an acceleration of events took place (Wilkins, 1965). That is, when a person obtained a reputation in her village as a witch, one would expect that people shed their inhibitions more quickly by accusing her. However, even with such a reputation, witches could live in their villages for forty years or more before the final act of the human drama took place. Perhaps one reason for this long delay was that fearful neighbors sometimes preferred to practice the policy of diplomacy toward the neighbor witch instead of denouncing him or her, in order to avoid antagonizing that person. But such diplomacy usually stopped short when the neighbor witch requested ordinary neighborly amenities (e.g., attempted to borrow a household item) and was refused. For example, Old Telsge Meins and Nuppenou were accused of having strewn bewitched seeds in front of Jurgen Appels's door. Allegedly they performed this act of witchcraft because Appels's wife had refused Telsge's request for "fresh butter" (Hess, 1992).

With respect to refusals of customary neighborliness, it has been said that the accusation of witchery may have served the function of compensating for the guilt feelings stirred up in the person who had refused (Macfarlane, 1970). On the other hand, it was generally believed to be inviting danger to lend or give one's belongings to a witch, lest he or she obtain, with the possession of these objects, supernatural power over the lender or giver.⁵

PRESENT-DAY STATUS OF WITCHCRAFT

Witchcraft and similar beliefs and practices occurred not only in seventeenth-century Trenthorst. Even nowadays there are people (relatively "primitive," to be sure) who engage in them. Long traditions of witchcraft exist in the Third World countries to this day. A news item dating from February 1984 in Lebowa, one of

South Africa's recently established homelands, reported that at the order of a tribal court, nine persons had been burned at the stake and two more hanged for witchery (i.e., harming persons and property through strikes of lightning). The police were quoted as expressing regret for having been unable to prevent these executions (*Orlando Sentinel*, 1984).

There is even a tendency in some of the developing countries to put witchcraft back into penal law, from which it had disappeared almost everywhere by the twentieth century. The Penal Law Reform Commission of Papua New Guinea recommended the inclusion of witch offenses in that country's proposed penal code (Papua New Guinea, 1978). At the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Caracas, Venezuela, in 1980, the minister of justice of Swaziland stated his preference for maintaining the death penalty for certain offenses connected with "black magic" and witchcraft (Swaziland, 1980). Witchcraft is also alive in pockets of the Western world, although not at high levels of government. Occult beliefs and practices still exist in many European countries, including France (Monter, 1976), Germany (Schoeck, 1978; Sebald, 1978, 1984), and Romania (Elaide, 1976; Lorint and Bernabe, 1977). In North America, the occult practices of Sicilians in Toronto (Rush, 1974) and in western Montana (Balch, 1975), as well as the *santeria* practices of Cuban refugees in Miami (Wetli and Martinez, 1981), have been discovered and studied.

The available data do not as yet form a comprehensive body of knowledge on present-day witchcraft. In particular, we know little about its criminological aspects and its impact, if any, on the victims of such practices. It may be pointed out that modern witch offenses offer both criminogenic and crime-preventive social-control aspects (Sebald, 1978, 1984). As to the former, the "dark figure" (the number of statistically unreported crimes) may be high in many developed countries; Schoeck (1978) estimated this "dark figure" for the Federal Republic of Germany at 99 percent. Many reported incidents have involved violence against persons

suspected of witchcraft or against their property (e.g., arson), as well as fraudulent offenses that exploited the credulity of believers in witchcraft.

Also in the Western world, the belief in and the practice of witchcraft may be on the rise. In 1956 and 1973, the same questions about belief in the existence of witches were asked twice in polls in West Germany. In the first poll, 1 percent firmly believed in their existence and 7 percent answered "perhaps." In 1973, the figures had risen to 2 percent and 9 percent, respectively (Schoeck, 1978, p. 9). In the United States, increases are suggested by police observations regarding the rise in occult occupations, stores called *botanicas*, and the finding of animal carcasses that have been used for ritual purposes (*New York Times*, 1978; Wetli and Martinez, 1981).

Finally, historical crime studies also appear useful, to some extent, for present-day problems. Modern witch offenses, because of their secretiveness and high "dark figure," may be difficult to investigate through behavioral science methods. It is quite plausible that historical research may offer some insights and may guide the formulation of hypotheses and theories that will shed light on the origin and prevention of these offenses.

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NOTES

1. Some blasphemy prohibitions may have originated out of a fear that a deity might punish a whole community for the blasphemous acts of any of its members.
2. See *maleficia* in Robbins (1978) for a detailed discussion of that concept.
3. One unidentified person is not included in the count.
4. The Wetkes were considered nobility from the time of the first witch trial onward, although they received their title in only about 1660. They held the social position of squire and the important privilege of holding court from the time they took possession of Trenthorst.
5. Thomas Ady, *A Candle in the Dark: or a Treatise Concerning the Nature of the Witches, and Witchcraft* (1656), cited by Macfarlane (1970, pp. 196, 318).

REFERENCES

- Anonymous. (c. 1615–1618). "Die von dem Possessor von Trenthorst *tumultuarie* gefuhrten Hexenprozesse 1613–1614." Dossier in the Central Archive of the German Democratic Republic.
- Balch, Robert W. (1975). *The Creation of Demons: The Social Reality of Witchcraft and Satanism in Western Montana*. Paper presented to the Pacific Sociological Association, San Diego.
- Bangert, Fredrich. (1963). *Geschichte der Stadt und des Kirchspiels Oldesloe*. Reprint 1976, Bad Oldesloe: L. H. Meyer & Brigitte Spethmann.
- Becker, Howard. (1963). *Outsiders: Studies in the Sociology of Deviance*. New York: Free Press.
- Carolina, *Constitutio Criminalis* (1532). (Reprint, n.d.). Wiesbaden: Reklam Verlag.
- Cohen, Norman. (1975). *Europe's Inner Demons*. New York: Basic Books.
- Elaide, Mircea. (1976). *Occultism, Witchcraft and Cultural Fashion*. Chicago: University of Chicago Press.
- Erikson, K. T. (1966). *Wayward Puritans: A Study in the Sociology of Deviance*. New York: Wiley.
- Estes, Leland L. (1983, December). "The Medical Origin of the European Witch Craze: A Hypotheaua." *Journal of Social History*, 271–283.

- Favret-Saada, Jeanne. (1977). *Les mots, la mort, les sorts. La sorcellerie dans le Bocage*. Paris: Galimard.
- Flade, Paul. (1902). *Das römische Inquisitionsverfahren in Deutschland*. (Reprinted 1972). Aalen: Scientia Verlag.
- Geis, Gilbert. (1982). "Witches: The Non-such Victims." In H. J. Schneider (Ed.), *The Victim in International in Perspective*. Berlin and New York: Walter de Gruyter.
- Glaser, Daniel. (1974). "The Classification of Offenses in Offenders." In D. Glaser (Ed.), *Handbook of Criminology*. Chicago: Rand McNally, College Publishing Company.
- Hess, Albert G. (1988). "Moderne Hexerei und Kriminologie." *Polizei Digest (Munich)*, 2.
- Hess, Albert G. (1989). "Hunting Witches: A Survey of Some Recent Literature." *Criminal Justice History*, 3.
- Hess, Albert G. (1992). *Trentthorst Witch Trials*. (In Preparation)
- Horsley, Richard. (1966). "History and the Criminologist." *Excerpta Criminologica*, 6(3).
- Horsley, Richard. (1971). "Deviance Theory and the History of Opiates." *International Journal of the Addictions*, 6(4).
- Horsley, Richard. (1979). "Who Were the Witches? The Social Roles of the Accused in the European Witch Trials." *Journal of Interdisciplinary History*, 9(4).
- Jensen, Wilhelm. (1956). *Trentthorst. Zur Geschichte der Liebschen Güter*. Neumunster: Karl Wachholtz.
- Kieckhefer, R. (1976). *European Witch Trials: Their Foundations in Popular and Learned Culture, 1300-1500*. New York: Routledge & Kegan Paul.
- Kramer, Henrich, and Springer, Jakob. (1486). *Malleus Maleficarum*. (M. Summers, trans.). (Reprinted 1971). New York: Dover.
- Langbein, John H. (1974). *Prosecuting Crime in the Renaissance: England, Germany, France*. Cambridge: Harvard University Press.
- Langbein, John H. (1977). *Torture and the Law of Proof*. Chicago: University of Chicago Press.
- Lemert, E. M. (1951). *Social Pathology*. New York: McGraw-Hill.
- Lorint, E. E., and Bernabe, J. (1977). *La sorcellerie paysanne: Approche anthropologique de l'homme magus avec une étude sur la Roumanie*. Brussels: De Boeck.
- Mactarlane, A. D. (1970). *Witchcraft in Tudor and Stuart England: A Regional and Comparative Study*. London: Routledge & Kegan Paul.

- Monter, E. William. (1976). *Witchcraft in France and Switzerland: The Borderlands during the Reformation*. Ithaca: Cornell University.
- New York Times*. (1978). "Fortune Tellers See Profits in New York: Police Report 'Seers' Have Grown 30% in 5 Years as Victims Pay for 'Curse Removal'" by Michael Goodwin. January 23, p. 32.
- Orlando (Florida) Sentinel*. (1984). "Johannesburg: Executions." February 24, p. A8.
- Papua New Guinea, Law Reform Commission. (1978). *Sorcery among the East Sepics*. Port Moresby: E. C. Awo.
- Peters, E. (1978). *The Magician, the Witch, and the Law*. Philadelphia: University of Pennsylvania Press.
- Robbins, H. (1978). *The Encyclopedia of Witchcraft and Demonology*. New York: Crown.
- Rush, John A. (1974). *Witchcraft and Sorcery: An Anthropological Perspective of the Occult*. Springfield, IL: Thomas.
- Schafer, H. (1955). *Hexenmacht und Hexenjagd: Ein Beitrag zum Problem der kriminellen Folgen des Hexenglaubens der Gegenwart*. Hamburg: Kriminalistic.
- Schoeck, Inge. (1978). *Hexenglaube in der Gegenwart: Empirische Untersuchungen in Südwestdeutschland*. Tübingen: Tübinger Vereinigung für Volkskunde e.V.
- Schur, Edwin M. (1971). *Labelling Deviant Behavior: Its Sociological Implications*. New York: Harper & Row.
- Sebald, Hans. (1978). *Witchcraft: The Heritage of a Heresy*. New York: Elsevier North Holland.
- Sebald, Hans. (1984). *Witchcraft as Justice: The Case of the Franconian Peasant Tradition*. Paper presented at the meeting of the Academy of Criminal Justice Sciences, Chicago.
- Swaziland, Minister of Justice. (1980). Statement presented at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela.
- Thomas, Keith. (1971). *Religion and the Decline of Magic*. New York: Scribners.
- Unverhau, Dagmar. (1978). *Angeklagte-Besagte-Verurteilte-Geschädigte in Hexenprozessen der Stadt Schleswig*. Paper presented at the Seventh International Economic Congress, Edinburgh.
- Unverhau, Dagmar. (1980a). "Dasz Gerucht dehe also, dasz sie zaubern solle: Sozialpsychologische Aspekte aus dem Hexenprozess gegen

- Margareth Ahlers, geb. Schulten, zu Bergedorf 1675-1678." *Justiz in Bergedorf*. Bergedorf: Lichtwark Ausschuss.
- Unverhau, Dagmar (1980b). *Von Toverischen und Kunstthruwen in Schleswig 1548-1557. Quellen und Interpretationen zur Geschichte des Zauber und Hexenwesens*. Schleswig: Schleswiger Druck & Verlagschau.
- Unverhau, Dagmar (1981). "Kieler Hexen und Zauberer zur Zeit der grossen Verfolgung (1530-1676)." *Mitteilungen der Gesellschaft für Kieler Stadtgeschichte*, 60(3/4).
- Weth, C. V., and Martinez, R. (1981). "Forensic Sciences Aspects of Santeria, a Religious Cult of African Origin." *Journal of Forensic Medicine*, 506-514.
- Wilkins, Leshe I (1965). *Social Deviance: Social Policy, Action and Research*. Englewood Cliffs, NJ: Prentice-Hall.

Perpetrators of Violent Crime as Potential Victims of Research in Prison

MARY ELLEN WAITHE, PH.D.

BACKGROUND

Picture, if you will, what philosophers and other political theorists call a just society. It is not a society that is perfectly just; that is why every society must leave room for mercy. It is a society that has an ideal of perfect social justice that functions as the standard against which the various individual and institutional practices in the society are judged. Each unjust act by an individual or an institution may have a barely perceptible or a catastrophic effect on the society. But each unjust act affects in some degree the fairness of the society as a whole.

In theory, a just society is in a constant process of attempting to identify its less-than-perfectly-just practices, correcting them as best it can. Enlightened self-interest provides what is perhaps the most compelling reason for each of us to be concerned with righting every injustice and with preventing any further injustices from occurring. Any injustice makes the society itself less just and weakens the foundations of those institutions which secure justice for the rest of us. Each person's interest in being treated justly

becomes the compelling reason for each of us to be concerned with preventing anyone, *even a perpetrator of a crime*, from being treated unjustly. For example, we want to make sure that the procedures that the criminal justice system has set up for prosecuting criminal matters are scrupulously followed. Enlightened self-interest, then, provides sufficient reason for all of us to be concerned with protecting perpetrators of crime from potential injustices inherent in the criminal justice system.

When a particularly notorious crime is committed, it is sometimes described by the press as the work of a "madman." Few of us will ever forget the "Son of Sam" or Mark David Chapman, the 1980 killer of John Lennon. Both were frequently described in the press as "mentally ill." When an arraigning judge in New York City believes that an accused person may be mentally impaired in his or her capacity to stand trial, the judge will remand the accused to a forensic unit for a psychiatric evaluation of his or her capacity to stand trial. Persons found *not competent to proceed* to trial are usually remanded to a maximum-security psychiatric hospital until they become competent to proceed, but this procedure is subject to statutory limitations that vary according to the nature of the crime charged. On the other hand, pretrial detainees must be found "competent to stand trial" before they may plead that at the time they committed the crime they were legally "insane." Thus those who plead "not guilty by reason of insanity" (NGRI) admit that they are the perpetrators but claim that, although they are now competent to stand trial, at the time of the commission of the crime they were insane.

By now the astute reader will have realized that there is great potential for alleged perpetrators who appear to be psychiatrically ill to become victims of the criminal justice system. For example, mentally retarded persons who have not been civilly committed and who in fact did not commit a crime may spend months in a maximum-security pretrial detention center because they do not understand the charge against them. Another situation in which mentally ill defendants could become victims of the criminal justice system occurs when defendants are paranoid-schizophrenic. Such defendants may understand the charges but may be

inordinately suspicious of the criminal justice system and of their attorneys. They may not have committed a crime, yet they may be unfit for trial because they lack the ability to cooperate with their defense counsel. They may spend years in a maximum-security psychiatric hospital waiting to become competent to stand trial. Similarly, severely neurotic persons may irrationally seek punishment and may convincingly confess to crimes that they witnessed but did not commit. On the other hand, a person who did commit a crime while legally insane may insist, "I'm not crazy," and may be found guilty rather than NGRI. This person would be punished rather than treated. When his or her sentence has been served, a very sick person reenters society. It is not difficult to see that a person who is psychiatrically ill and who is accused of committing a crime can become a victim of the criminal-justice mental-health system.

INSIDE A FORENSIC PSYCHIATRIC JAIL

The New York University–Bellevue Hospital Forensic Psychiatric Service—known as the Bellevue Hospital Prison Ward, the site of the research discussed in this chapter—is New York City's major forensic unit. It is a maximum-security jail of the New York City (NYC) Department of Correction and is operated within the psychiatric division of Bellevue Hospital, a general municipal hospital. The unit is staffed by an academic department of the New York University (NYU) School of Medicine and the NYU Medical Center, as well as by the NYC Department of Correction. The ward is physically located on the first floor of Bellevue Psychiatric Hospital, a decaying piece of Gothic architecture. The unit has high, cavernous ceilings and is located above the hospital's laundry facility. It is a noisy, often hot and steamy, place where sound reverberates with every clang of the prison bars. It is extremely overcrowded, with dozens of detainees sleeping in large dormitory areas. The population of the ward is composed almost entirely of pretrial detainees, although a few patients are postsentenced prisoners from the Riker's Island penitentiary. (The

postsentenced prisoners are serving time for a previous crime and have been charged with committing a second offense while in prison. During their imprisonment, a question may have arisen about their competency to stand trial for the second offense.) All detainees are male and have been remanded to the ward either because they are in need of psychiatric treatment beyond the scope of that available at the psychiatric observation units at Riker's Island or because questions have arisen as to their competency to stand trial. A large number of detainees who are subsequently found competent to stand trial will enter a plea of NGRI. Most of the detainees on the ward have been accused of such serious crimes as murder, arson, rape, assault, kidnapping, or hijacking.

THE PSYCHIATRIC STAFF

Each staff psychiatrist on the ward wears one of two hats with respect to any detainee: the psychiatrist either is the detainee's court-appointed evaluating psychiatrist or is the detainee's treatment psychiatrist. An evaluating psychiatrist is charged by the court with evaluating whether a pretrial detainee is competent to stand trial. The evaluating psychiatrist must examine the detainee over a specified period of time (usually forty-five days) and determine whether the detainee understands the nature and seriousness of the charges leveled against him and whether he has the capacity to cooperate with his attorney in his defense. The evaluating psychiatrist is an officer of the court and is part of the adversary system of criminal justice. The treatment psychiatrist, on the other hand, functions as a detainee's personal physician. The resulting doctor-patient relationship is presumed to be a confidential relationship. The treatment psychiatrist may not disclose information to the court without the informed consent of the detainee (i.e., his patient). The confidential doctor-patient relationship enjoys the same prohibitions on disclosure of confidential information that also protects attorney, spousal, and confessor relationships. In addition to the psychiatrists, there are psychiatric

social workers, psychiatric nurses, a community service volunteer, corrections officers, psychiatry residents, and fellows who are completing their advanced training through NYU School of Medicine.

The research team, including psychiatrists, a psychologist, and a neurologist, received permission to conduct research on the ward. Once we added the research team, we now had three types of psychiatrists: research, evaluating, and treating. Each had a distinctly different kind of relationship with every detainee.

STUDYING VIOLENT ADULTS

The researchers were attempting to duplicate the results of their earlier research with incarcerated violent juveniles. The earlier research revealed that the number and severity of violent acts committed by a juvenile corresponded to that child's psychotic symptoms, to neurological abnormalities in the brain, and to the child's experience of physical abuse and of witnessing severe physical abuse of close family members (Lewis and Shanok, 1979; Lewis, Lovely, Yeager, and della Femina, 1989). The research team used a variety of psychiatric, psychological, neurological, and educational evaluations to test their hypothesis that there is a statistically significant correlation among extremely violent males and their psychotic symptoms, neurological abnormalities, and experience of physical abuse. Having received approval to conduct their research on the ward, the researchers next submitted their proposal to the ward's ethics group, with the request that we review their proposal and evaluate its ethical acceptability.

THE ETHICS GROUP

The ethics group was composed of staff psychiatrists, a community service volunteer, and two philosophers who specialized in health care and legal ethics. This group was joined by psychiatric fellows and residents who were completing their aca-

demic clinical training on the ward. Occasionally, correctional, nursing, and social work staff also participated in our discussions. Our ethics seminars were conducted by the philosophers and the psychiatrist who was the director of the psychiatric service. The seminars were a part of the professional education mission of the ward and gave careful attention to the question of whether an alleged perpetrator could be victimized by participating in the research project.

THE ETHICAL ISSUES OF CONDUCTING RESEARCH

It may be useful at this point to distinguish between the kinds of investigations that the research team planned to conduct as part of their research and those that are part of the routine competency-to-stand-trial examination. The research team would perform neurological as well as psychiatric and psychological examinations of the participating detainees. The neurological evaluations were not part of the standard court-mandated psychiatric evaluations, and the psychological testing of detainees was more extensive than the caseloads of the evaluating psychiatrists ordinarily permitted. Where indicated, the detainees who participated in the research project would receive CAT scans and other expensive, sophisticated diagnostic procedures. Thus the researchers had the resources with which to perform far more extensive and more sophisticated investigations of a detainee's mental health than were part of the routine competency examinations. In theory, neurological examinations may uncover previously undetected physical disorders such as brain tumors and risks of stroke. Similarly, it was possible that the researcher's use of more sophisticated psychological measurement tools and of more time-consuming psychiatric interviews would yield more definitive conclusions about a detainee's psychological makeup and psychiatric illness.

The reader will recall that most of the prospective research subjects were pretrial detainees (persons who are presumed to be

innocent until they have been proved guilty in a trial). These prospective research subjects, not having pled guilty or been found guilty after trial, therefore were entitled to all the legal protections that are normally given to pretrial detainees. They had the right to be represented by legal counsel. Until their mental condition was established, the usual forms of legal protection existed, and we could not induce illegally obtained confessions. Because most of the detainees had been accused of serious crimes, any self-incriminating evidence given either to the court-appointed evaluating psychiatrist or to the research psychiatrists could lead to conviction and result in a life sentence. In the case of those accused of the murder of a police officer, self-incriminating evidence could result in conviction and even execution. After examining these and other factors, the ethics group recommended that a detainee's participation in the research project should not create a risk of jeopardizing the detainee's defense. The alleged perpetrator should not become a victim of a research project in the criminal-justice mental-health system. We also did not intend to serve as advocates for the detainees with respect to their court cases. Rather, we saw this no-risk-to-detainee position as reflecting what in law and philosophy is called a *reasonable-man view*: It would be unreasonable to expect a detainee to participate voluntarily in a research project that was likely to contribute either to a correct or to an incorrect guilty verdict. An incorrect guilty verdict might result, for example, if a neurotic detainee falsely confessed to a crime he did not commit or if a detainee mistakenly was found competent to stand trial and refused to plead NGRI, irrationally and falsely insisting, "I'm not crazy now, and I wasn't crazy then." The reasonable-man standard would not be met if confidentiality were not ensured or if valid informed consent were not obtained.

CONFIDENTIALITY ISSUES

Several different types of concerns made us question whether the research findings should be confidential, not to be divulged by

the researchers. We were concerned about harm to the detainee himself, risks to others, and risks to the system of justice. There were harm and risks involved both if the research information remained confidential and if it did not.

Risks to Perpetrators and Detainees

The researchers' findings might have been significant in a detainee's NGRI defense. For example, if the researchers uncovered a history of violent physical abuse of the detainee that had resulted in brain damage, the detainee's attorney might successfully argue at trial that the brain damage had impeded the detainee's ability to control impulses or to understand what he was doing. On such grounds, it might well be successfully argued that the defendant should be found NGRI. One of the advantages that the researchers were prepared to offer to detainees in return for their participation in the research project was that the detainees would have an opportunity to have any newly diagnosed disorder treated. Diagnoses of "nonreportable" illnesses (for example, AIDS) are usually considered a confidential matter between physician and patient. The patient may elect to refuse treatment for such illnesses. However, in a prison setting, untreated conditions may result in unanticipated medical emergencies such as cardiac arrest. Because the ward is a jail, it has many levels of security gates that must each be opened by an armed guard with a key. Getting a piece of emergency equipment through to a cardiac arrest victim in a timely manner becomes a serious logistics problem. If the condition has been treated medically before a crisis occurs, it is quite likely that death will be avoided. If the detainee was a victim of his own paranoid irrational desire to keep his condition a secret (or simply did not believe the diagnosis), should the researchers be able to communicate their findings to the treatment staff so that they in turn might secure a court order permitting them to treat the detainee against his wishes?

Not all risks to detainees were physical in nature. Many of the risks, as identified earlier in this chapter, were of a legal nature.

Let us say that, in the judgment of the researchers, a detainee is genuinely mentally ill. However, in the judgment of the evaluating psychiatrist, the detainee is malingering mental illness. The evaluating psychiatrist intends to find that the detainee is fit to stand trial. The detainee may in fact be unable to contribute adequately to his own defense and may wrongfully be found guilty; for example, perhaps he is neurotic and wants to be punished but has done nothing illegal. If the researchers disclosed their findings to the evaluating psychiatrist or to the court, such victimization of the detainee might be avoided. Should there be disclosure by the researchers in order to prevent such possible victimization of a mentally ill pretrial detainee?

Risks to Others

It was also conceivable that during extensive psychological testing and psychiatric interviewing, detainees who participated in the research might disclose to the researchers information about threats of violence against staff members or other patients. Because the disclosure would have been made to someone who was in a physician-patient relationship to the detainee, should it remain, as all physician-patient communications are, confidential?

Risks to the System of Justice

If the researchers were permitted to communicate their findings to the evaluating psychiatrist, the information learned from detainees who were participants in the research project might assist the evaluating psychiatrist in determining, in difficult or close cases, whether the detainee was competent to stand trial. Some of the most difficult cases in which to make a determination of competency are those in which the detainee malingers mental illness. As inhospitable a place as Bellevue's prison ward is, many detainees prefer conditions there to those at Riker's Island House of Detention for Men. Some detainees who *are* competent malin-

ger mental illness in order to be transferred to Bellevue or to sustain an NGRI defense. Occasionally a malingerer is able to fool the court's evaluating psychiatrists. What should the researchers do if, in their professional judgment, the evaluating psychiatrist had been hoodwinked by a detainee who was a research subject? Should the researchers disclose their suspicions and their test results to the detainee's evaluating psychiatrist, or should the researchers maintain confidentiality? Would failure to inform on their research subject constitute an obstruction of justice? Would the disclosure of information that was given in confidence be a violation of medical ethics?

RESOLVING THE CONFIDENTIALITY ISSUES

Clearly, the issue of whether research findings should be confidential and should not be divulged to the evaluating psychiatrist needed to be resolved before any detainees were recruited as research subjects. This ethical conflict between respecting a detainee's legal right to accept or reject medical treatment and preserving the life of a patient who may be incompetent to make his own decisions was resolved by making consent to the disclosure of information about life-threatening emergencies a condition for accepting the detainee as a research subject. We incorporated into our protocol an authorization for the researchers to disclose to the treatment staff any information about possible heart attack, stroke, seizure disorder, or suicide gestures and threats.

In recommending this protocol for the disclosure of emergency information, we appealed to the principle that life-threatening situations are sufficiently important to warrant overriding irrational, perhaps paranoid, desires for confidentiality. This principle was subject to a side constraint: The disclosure of confidential information was to be on a need-to-know basis.

The same reasoning informed our deliberations concerning information about threats to others. Respect for the confidentiality

of medical information has traditionally been limited to information that would not place others at significant risk if it were not disclosed. This risk to others furnishes the philosophical justification underlying the laws that require physicians to report to the NYC Health Department incidents of certain diseases. This risk to others also forms the basis for collecting epidemiological information on the incidence of many diseases, from tuberculosis to measles. We therefore reasoned that this ethical principle—that innocent persons should not be placed at undue risk—should also apply in this case to threats of violence against others and to threats of riot. We incorporated this feature into our informed-consent protocol. Threats against others or threats of riot would be disclosed to the parties who needed to know: the nursing, psychiatric, social work, and correctional staff.

We came to a different conclusion regarding the malingering issues, concluding that such disclosure would be a violation of medical ethics. Moreover, that disclosure would be tantamount to usurping the proper role of the judge, who had ordered the competency evaluation to be performed by the court psychiatrist and not by the research psychiatrist. We reasoned that it would be unreasonable to expect a detainee to voluntarily participate in a project that might elicit self-incriminating statements, which would then be reported to the court. All defendants have the right, under the Fifth Amendment of the U.S. Constitution, not to incriminate themselves. It would be unfair, and probably illegal, to entice a detainee into participating in a project with promises of confidentiality and opportunities for treatment and then to violate those promises because the researchers disagreed with the findings of the evaluating psychiatrist. To do so would raise questions about adequate *Miranda* warnings. Moreover, whereas the research investigation involved nonexperimental neurological and psychiatric assessments, these assessments were far more extensive than those that are routinely performed as part of Bellevue's competency evaluation. Were the researchers to give adverse testimony either to the court or to the evaluating psychiatrist, there might be some basis for a detainee's attorney to claim that the

nonparticipating detainees were being less vigorously prosecuted than were those who were participating in the research.

We recommended a protocol that required a separate informed consent by the detainee for disclosure to the evaluating or the treatment psychiatrist of any information obtained by the research team. The sole exception would be the aforementioned information related to life-threatening emergencies that posed a threat either to the detainee or to another person on the ward.

INFORMED-CONSENT ISSUES

What protocol and criteria should prospective research subjects meet in order to be considered competent to give informed consent to participate in the project? Informed consent is usually defined as assent that is voluntarily given by a competent, adequately informed person (Faden and Beauchamp, 1986). Whether consent was voluntarily given rested on the characteristics of the prospective research subject, the environment in which consent was sought, and on the characteristics of the person who functioned as a consent obtainer (Waithe, 1982).

Voluntariness

Clearly, consent given to someone armed with a weapon is not voluntary. Consent was likely to be truly voluntary if the setting in which it was sought was noncoercive, if the circumstances were not anxiety-filled, and if the consent obtainer was not in a position of power, authority, or undue influence over the consent giver. The setting, a maximum-security facility, was certainly restrictive. But was it coercive? The *Kaimowitz* case (1973) held that a psychiatric prison environment was so inherently coercive a setting that voluntary, informed consent for risky, experimental psychosurgery was virtually impossible. Although the research project we were considering was neither experimental nor medically risky, we sought ways to diminish any coercive elements inherent in the setting that might otherwise undermine

the ethical acceptability of the consent procedure. We did not want to create a risk that the participating detainees would be victimized by participating in the research. We recognized that detainees often view nurses, psychiatrists, and correction officers as having punitive power. Although this is true (for example, the detainee can be placed in isolation or can be drugged to control violent assault), we did not want the detainees to fear that their usual care and treatment on the ward would be jeopardized if they refused to participate in the research.

The extent to which the consent environment was coercive would depend in part upon the characteristics of the consent obtainer. We decided that only the psychiatric social workers met all of the criteria for obtaining informed consent. These experienced professionals had had ongoing relationships of trust with the detainees. They knew them as well as anyone on the ward. They had cooperated with detainees' requests to meet with counsel and had assisted them in a variety of matters, including notifying families, assisting with financial arrangements, securing medical records, and attending to other personal needs. The psychiatric social workers had no vested interest in the research project and had no authority over the detainees. Because the social workers were not in a position of power, authority, or undue influence over the detainees, any consent given to them would come as close as possible to meeting the requirement of voluntariness in an essentially coercive environment. They also had the training to be able to explain the research procedures and the consent form. They had the experience and the ability to provide adequate, accurate, jargon-free answers to the questions that the detainees might have concerning the research. We concluded that the consent obtained by the social workers was likely to be voluntary, informed consent.

Competence of the Detainee

Once we decided that the psychiatric social workers had the expertise to assess whether the detainees met the criteria for

competence to consent we asked: What should those criteria be? In discussing who could give consent, we began with a premise based on the *Rennie* case: A mental patient has the right to exercise personal autonomy by refusing treatment. To this we added a second premise, again, one based on then-existing law: Older children (teenagers) have legal rights to substance-abuse counseling, birth control, and abortion services without parental knowledge or consent (Koppelman and Moskop, 1989). Together, these two premises seemed to imply that legal competence to consent to or to refuse medical treatment requires only an extremely low level of competence, such as that met by most older children, by the mildly mentally retarded, and by minimally rational mentally ill persons. This view also reflects the view of influential moral philosophers such as John Stuart Mill (Waithe, 1983). We labeled this the minimalist conception of competence. Detainees who met this level of competence, however, might not fully comprehend that their participation in the research project was voluntary; they might suspect that they would be punished if they refused to participate. Moreover, they might be confused about which communications and records were confidential. They might also fear that their medical care on the ward would be adversely affected were they to withdraw from the project.

Adequacy of the Information

Consent was likely to be informed when and only when it was based on adequate information and on positive assent rather than the mere absence of refusal. What counted as adequate information? Should each procedure be described in advance of seeking a detainee's consent to participate, or would that amount of detail be confusing? Should a general description be provided in advance and promises be made to provide more specific information about each procedure immediately preceding that procedure? Should the risks and benefits to society be described, or only those that directly affected the detainee? Should the detainee be offered the

opportunity to withdraw from the research at any time, or should consent, once given, be treated as binding?

RESOLVING THE INFORMED-CONSENT ISSUES

With respect to competency as it is related to informed consent, we decided to recommend erring on the side of caution and to require a higher-than-minimalist level of competence for detainees to consent to participate in the project. We identified several criteria for meeting this higher-than-minimalist level of competence. These criteria included basic orientation as to time, place, and person; intact immediate and recent memory; absence of paranoia about the research project; and adequate intellectual functioning, reflected by an ability to understand the confidential nature of the project and to decide, using a reasonable-man standard, whether or not to participate. The latter criterion was to be tested for by having the detainee "explain back" to the consent obtainer what he understood the project to be about and what *his* reasons were for participating in it. Judgment and insight were to be evaluated in light of the detainee's awareness of the research methods to be used and the possible risks and benefits to him of participating in the project.

Prospective participants would be given a description of the psychiatric, psychological, neurological, and educational assessments to be performed as part of the research projects, as well as a description of the risks and benefits to the detainee and the possible benefits of the research to society. The detainees would be provided this information under circumstances that, in the opinion of the psychiatric social worker, would be the least anxiety-producing. The information would be provided to a detainee who was a prospective participant in the research at least twenty-four hours before the detainee's initial participation in the project. The detainee's competence and understanding would be reassessed immediately before any testing or interviewing was begun. Once again, the detainee would be asked to "explain back"

his understanding of the nature, purpose, risks, and benefits of his participation in the research project, and he would be reminded that participation was strictly voluntary and that he could withdraw from the project at any time with no effect on his care or on the status of the evaluation of his competency to stand trial.

SUMMARY

Whereas ethical theory is perhaps fashioned for perfect worlds, the Bellevue Prison Ward was among the least perfect of worlds. The restrictive nature of its environment prevented us from eliminating all coercive aspects of the consent procedure. We also realized that our goal of preserving confidentiality was somewhat more difficult to accomplish in practice than in theory. An evaluating psychiatrist might "bump into" a detainee who was being interviewed by a researcher on this overcrowded ward with its lack of privacy. Nevertheless the ethics group concluded that the research project would bring substantial benefits. Detainees would receive treatment for previously undiagnosed disorders. Our understanding of the relationship between child abuse, psychoses, neurological disorders, and criminal violence might well be expanded. In the judgment of the ethics group, by incorporating our recommendations into their protocol the research team would provide those benefits while minimizing the risk that those who were accused of being perpetrators of crimes would themselves become victims of the flaws inherent in the criminal-justice mental-health system.

Ours is not a perfectly just society. It is one that has adopted an ideal of perfect social justice against which our social institutions and social practices are judged. Any injustice makes the society itself less just, while weakening the foundations of those institutions that secure justice for the rest of us. Were projects of this nature to go forward without building in the kinds of assurances of confidentiality and informed consent that were the substance of our recommendations, we would be chipping away at

two important legal doctrines that form the foundation of our system of justice. At risk would be the doctrine that an accused person is innocent until proven guilty at trial or court of law, and the doctrine that a person must be mentally competent to participate in his or her own defense. Chipping away at these doctrines would erode our democratic doctrines of equal, fair, and just treatment for all—innocent and guilty—and would make victims of us all.

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REFERENCES

- Faden, R., and Beauchamp, T. (1986). *A History and Theory of Informed Consent*. New York: Oxford University Press.
- Kaimowitz v. Michigan Department of Mental Health*. (1973). Unreported, Cir.Ct. Wayne Co., Mich.
- Koppelman, L., and Moskop, J. C. (Eds.). (1989). "Children and Health Care: Moral and Social Issue." *Philosophy of Medicine*, 33.
- Lewis, Dorothy O., and Shanok, Shelly. (1979). "A Comparison of the Medical Histories of Incarcerated Delinquent Children and a Matched Sample of Non-Delinquent Children." *Child Psychology and Human Development*, 9(4), 210-214.
- Lewis, Dorothy O., Lovely, R., Yeager, C., and della Femina, D. (1989). "Toward a Theory of the Genesis of Violence: A Follow-Up Study of Delinquents." *Journal of the American Academy of Child and Adolescent Psychiatry*, 28(3), 431-436.
- Rennie v. Klein*. (1979). 462 F.Supp. 1131 (D. N.J.). Explained, Cir.1, 634 F.2d 650, 653, 478 F.Supp. 1342, 3371; Aff'd Cir.3, 519 F.Supp. 466, 474, 608

F.Supp. 1151, 1155, Cir 5, 498 F.Supp. 1038, 1049, Cir 6, 506 F. Supp. 915, 929. Criticized, Cir 7, 770 F.2d 619, 630. Aff'd Cir 7, 874 F.2d 1201, 1213, Cir 10, 864 F.2d 695, 698. Cited, California 209 Cal App 3d at 1311, 243 Cal Rptr 241, 245, Colorado, 198 Colo. at 411, 603 F.2d 123, 125, Colo. at 662 P.2d 184, 186, District of Columbia 403 A.2d 744, 752, Kentucky 619 S.W.2d 730, 731, Massachusetts 383 Mass. at 440, 390 Mass. at 507, 421 N.E.2d 40, 54, 458 N.E.2d 308, 320, N.J. 233 N.J. Super. at 358, 558 A.2d 1357, 1358, Oklahoma 609 P.2d 747, 749, and Utah 636 P.2d 1085, 1090.

Waithe, Mary Ellen (1982) *Acting for Others: Towards a Theory of Paternalism*. Unpublished doctoral dissertation, University of Minnesota.

Waithe, Mary Ellen (1983) "Why Mill Was for Paternalism." *International Journal of Law and Psychiatry*, 6, 101-111.

C. CORPORATE OR INSTITUTIONAL VICTIMS

Man must never be treated as an object.

IMMANUEL KANT (1724–1804)

God help the patient.

LORD WILLIAM MURRAY MANSFIELD (1705–1793)

The art of medicine consists of answering the patient while nature cures the disease.

VOLTAIRE (pseudonym of FRANÇOIS-MARIE AROUET,
1694–1778)

Physician, heal thyself.

LUKE 4:23

Look to your health; and if you have it, praise God, and value it next to a good conscience; for health is the second blessing that we mortals are capable of; a blessing that money cannot buy.

IZAACK WALTON (1593–1683)

Computer Crime and Victim Justice

JOHN T. CHU, PH.D.

INTRODUCTION

This chapter does not deal with computer crime *per se*. Its objective is to demonstrate, by an analysis of this type of crime, that the traditional approach to criminal law and justice is cumbersome and ineffective, and that new legislation could quickly become obsolete with the advancement of science and technology. Furthermore, if victim justice is given more careful consideration and emphasis, the legal system should improve significantly. The time is ripe for more systematic and scientific approaches to criminal and tort laws so that existing laws can be simplified and made more effective while reducing the need for new laws to include technological changes. General discussions of ways to improve the legal system can be found in Chapter 8 of this book. This chapter is an application of similar ideas to a specific area. General information on computer crime is available in the articles and books cited in the chapter reference list.

WHAT IS COMPUTER CRIME?

To a layperson, computer-related crimes are various kinds of offenses and wrongdoings in which computers are involved in one way or another. The simpler term, *computer crimes*, appears to be equally descriptive. No further search for a better definition seems necessary. But the traditional approach to crime requires strict definition, and experts' opinions vary about how this "new" type of crime should be legally defined. Since the early 1980s, the experts and lawmakers have defined this type of crime as follows:

Computer Crime

The term *computer crime* is preferred by those in favor of a strict definition. For example, John K. Taber, a computer programmer, said during a Senate hearing (96th Congress Session, 1980), "I tend to take a very strict definition of what should be a computer crime. I define computer crime as when a computer is directly or significantly an instrument of a crime. I do not believe that if you forge a credit card receipt that that should constitute a computer crime" (p. 39). One can see that Taber's definition is not much better than a layperson's idea based on common sense.

Computer-Related Crime

Computer-related crime is the official term used in the congressional bills S.240 and H.R. 3970 (96th Congress Session, 1980, and 97th Congress Session, 1981). These and follow-up bills evolved into public laws on computer crimes several years later. However, neither bill contained a single statement that defined the crime. An example of what experts said is:

At present, there is no universally accepted definition of computer related crime. . . . Computer related crime has been variously characterized as using a computer to steal money, services, or property, or to commit an invasion of privacy, or an act of extortion or terrorism. . . . An illegal act

in which knowledge of computer technology is essential for successful prosecution. . . . (Koba Associates, Inc., 1980b, pp. 3-4)

Similarly, Donn B. Parker, an authority on computer-related crime, testified at congressional hearings that the crime is "the use of a computer to perpetrate acts of deceit, concealment and guile that have as their objective the obtaining of property, services . . . [all of which] have one commonality . . . the computer is either the tool or the target of the felon" (Parker, 1978, p. 11; see also Parker and Nycum, 1981).

These experts' statements in the early years of computer-crime legislation may or may not be viewed as good definitions. A common weakness is that the definitions create the impression that a computer crime or a computer-related crime is actually an "old" crime involving a new tool or object. Since I began researching this topic, in 1982, no better characterization of this type of crime has been suggested.

What did the lawmakers do about defining this crime and passing new legislation? At the federal level, the effort began with former Senator Abraham Ribicoff's introduction in 1977 of the Federal Computer Systems Protection Act (Becker, 1982, pp. 4-5; Frankel, 1982, pp. 28-29). I attended some of those hearings, held in the fall of 1982. Computer fraud and abuse are defined in H.R. 3970 (the Federal Computer Systems Protection Act of 1981) as the use of or attempt to use

a computer with intent to execute a scheme or artifice to defraud, or to obtain property by false, fraudulent pretenses, representation, or promises, or to embezzle, steal or knowingly convert to his use or the use of another, the property of another.

Computer is defined as

a device that performs logical, arithmetic, and storage functions by electronic manipulation, and includes any property and communication facility directly related to or operating in

conjunction with such a device, but does not include an automated typewriter or typesetter, or any computer designed and manufactured for, and which is used exclusively for routine personal, family, or household purposes including a portable hand-held electronic calculator.

Comments on these definitions will be given in the following sections.

Major Categories of Computer Crimes

Parker and Nycum (1981, p. 3) listed four major categories of computer crimes: (1) a computer as the object of attack, for example, by international terrorists; (2) a computer as the subject of a crime, by providing the automated mechanisms to modify old forms of assets or to manipulate new forms of assets, such as computer programs and information representing money; (3) a computer as a tool or instrument for conducting or planning a crime, such as the production of forged investment statements; and (4) the symbol of the computer used to intimidate or deceive, as where a stockbroker falsely tells his clients that he has a secret computer program for rapid stock-option trading and huge profit. Conly and McEwen (1990, p. 3) listed five categories. (1) internal computer crimes, such as "Trojan horses" and "logic bombs"; (2) telecommunications crimes, such as hacking and misuse of telephone systems; (3) computer manipulation crimes, such as embezzlements and frauds; (4) support of criminal enterprises, such as money laundering and data bases that support drug distribution; and (5) hardware and software thefts, such as software piracy and thefts of computers.

The Seriousness of Computer Crime

Opinions on the question of the seriousness of computer crime vary, as they do on a related question: Is it more serious today than it was ten years ago? What is clear is that, unlike

serious street crimes, ordinary people do not seem to feel threatened by computer crimes.

As to the seriousness of computer crime, Parker (1978, p. 11) and Ball (1982, p. 21), for example, calculated that the total financial loss in the United States caused by computer crimes may be \$5 billion per year. They estimated the average computer bank fraud at \$430,000, whereas conventional bank robbers averaged \$2,500. According to Conly and McEwen (1990), "A recent study by the accounting firm of Ernst and Whinney in Cleveland estimated that high-tech thieves in the U.S. steal 3 to 5 billion dollars annually" (p. 2). Another author (Francis, 1987) stated that "the on-scene 'stick-'em-up' bank robber averages around \$8,000 per robbery The more sophisticated bank robber who uses a computer as his partner averages half a million dollars" (p. 14). Some believe that computer crime just cannot be a serious problem. For example, Taber (96th Congress Session, 1980) testified, "I insist that modern computers are difficult to subvert . . . because of their built-in security features" (p. 41).

Taber was only partly right. Modern computers can be subverted, and happy hackers (Francis, 1987, pp. 17-49) are getting publicity. Robert Tappan Morris, a twenty-four-year-old computer science student, was found guilty of intentionally disrupting a nationwide computer network—by writing a program that copied itself wildly, like a virus, in thousands of separate machines (Markoff, 1990b, p. A21). Hackers Frank "The Leftist" Darden and Adam "Urville" Grant are among six hackers in four states whose tampering at Bell South threatened to shut down life-saving 911 emergency lines in nine states: they faced up to forty years in jail and \$2 million in fines (Howlett, 1990, p. 3A). Some believe the hackers are the least of the new white-collar criminals and may even be brilliant-but-bored teens looking for adventure; others think they are crooks (Howlett, 1990, p. 3A). Whatever their intentions, the hackers do show that, in this kind of crime, computer skill is instrumental, and built-in security features can be broken. Hackers also create difficult legal problems. One is that their base of operation may be a foreign country, where laws have

yet to be enacted for prosecuting intrusions into computer systems (Markoff, 1990a, p. 1). Another is that the crackdown by federal and state law-enforcement agents is adversely affecting computer users who are not breaking the law, but who are being intimidated and are suffering illegal searches and violations of their constitutional guarantees to free speech (Markoff, 1990c, p. 1).

NEW LEGISLATION: PROS AND CONS

The Federal Computer Systems Protection Act, introduced by then-Senator Ribicoff in 1977, was the first bill on computer crime. In less than five years, while Congress continued debates on the need of new laws, eleven states had adopted computer crime laws patterned after the Ribicoff bill (Frankel, 1982, p.29). Since then, various forms of fraud statutes involving computers have been passed both by Congress and by most states, as well as by most industrialized nations in Europe and Japan (Organization for Economic Cooperation and Development—OECD, 1986, pp. 12–22). But opinions on the need for new laws have not been unanimous. In the end, the “problems were addressed by the creation of some new offenses and the elaboration of some existing offenses” (McKinney’s, 1988, p. 174). To provide some ideas about the pros and cons of legislation, the following testimony, which was given in congressional hearings on bills S.1776, S.240, and H.R. 3970, may be illuminating:

Cons: “What we are really talking about is a theft and what we are talking about is how you do it” (96th Congress Session, 1980, p. 56). “There are 40 sections of the U.S. Code . . . that have direct utility to Federal prosecutions of computer abuse. What then is the compelling need for the legislation?” (96th Congress Session, 1980, pp. 1–2). “If you intend real computer crimes, I do not think there will be much to do. I think this bill will be an unthumbed section of the United States Code”; “I do not believe that computer crime can be meaningfully defined”; “It is of the same nature as

the term 'white-collar crime.' I believe there are basic crimes, theft, . . . and so on, but I think 'computer crimes' is a meaningless term" (96th Congress Session, 1980, pp. 43-44). "The conclusion of this report is that the greatest need is for more effective prosecution under existing law through a modern law enforcement structure, not for new laws and regulations" (Wessel, 1981, p. 3).

Pros: "The abuses go by familiar names of fraud, theft, larceny. . . . However, new circumstances associated with automation have created a new kind of crime. Occupations of the perpetrators, environments, modi operandi, time scale, geographic constraints and forms of assets are all new" (Parker, 1978, pp. 7-8). "Most unauthorized activity studied is sanctioned by existing federal statutes, when federal jurisdiction can be obtained. However, what is theoretically possible and what occurs in practice are frequently disparate, particularly when a sophisticated level of technical expertise as well as imaginative reasoning is required to perceive the applicability of a particular federal sanction to a technologically new and complex set of facts" (Nycum, 1978, p. 407). "As we enter the information age, business and white-collar crime is changing significantly. Valuable assets are increasingly represented by information, an intangible property. . . . The following changes are occurring: New greater requirements for trustworthy employees . . . ; new environment for business and white collar crime . . . ; new forms of assets subject to criminal attack . . . ; new criminal methods . . . ; new time scale; and wider geographical scale. . . . The use of computers for criminal purposes in bookkeeping, drug distribution. . . . The size of losses in significant cases will increase dramatically because of the concentration of information assets . . . in fragile forms subject to powerful manipulation by computer" (Parker and Nycum, 1981, pp. 5, 203).

Researchers have also pointed out that traditional criminal laws, at both federal and state levels, may or may not be applicable to computer-related crimes (Koba Associates, Inc., 1980b, pp. 1-14). Koba Associates (1980a) listed some fifteen "unique aspects" of computer-related crimes and said that "notwithstanding its similarity in many respects to other forms of white collar crime, there

are many unique aspects to computer-related crimes which make its investigation and prosecution difficult" (pp. 8-10).

Main Lines of Legislative Policy

One study (OECD, 1986, pp. 12-13) found the following legislative policies among the industrialized nations:

1. Computer-related crime is regarded as presenting no special features requiring any particular new measures, and hence no need is perceived for any distinction between information and computerized information, the computer simply being an instrument for committing an act already covered by existing law. The paramount problem is considered the security systems, as well as compensation for damage caused to private property. This attitude has been adopted by Belgium, Iceland, and Japan.

2. A second approach is to decide that legislative measures are needed, two methods being to amend existing law provisions in order to encompass this new form of criminality, and to add the computer dimension to existing crimes (these two methods can be used jointly). Among the sixteen countries following this approach are Australia, Austria, and the United States.

3. Another approach, sometimes accompanying the above two, is treating computer-related crime as one component in the information technology revolution that is transforming the patterns of society, and demanding a thorough review of such basic concepts as property rights in information, their standing in law, and the legal environment.

VICTIM JUSTICE MAY BE CRUCIAL

If the law emphasized the harm inflicted on the victim, the need for new legislation for computer crime would be greatly reduced. In fact, the same may be said about "new" crimes and civil wrongdoings in general. Let us begin with those cases in

which, in Nycum's opinion (1978, pp. 4-13), computer-related crime may create new problems and require new legislation.

1. Suppose a dating service charges higher fees and claims that it uses a computer for better matching when, in fact, it does not own or have access to a computer. Has the service committed a computer fraud? *Answer:* Why bother with this kind of question? The issue is not whether a computer was involved. The issue is whether there was a fraud, and how much the overcharge was, as compared with the charges of dating bureaus that did not claim the use of computers. Many well-known consumer frauds are comparable. For example, if a producer claims that his milk is fortified with vitamins A and D, he is legally required to fortify his milk with these vitamins even if he charges the same amount as producers of unfortified milk. Nobody ever thought about enacting a "vitamin-related criminal code" to punish those who make false advertising statements about the vitamin content of foods.

2. Sanctions are absent, under both federal and state jurisdiction, against the unauthorized transfer of electronic impulses. Also absent are clear sanctions against the unauthorized use of debit cards or other instruments similar to but not defined as credit cards. *Answer:* Electronic impulses, debit cards, and credit cards are all instruments. The real issues are: Who is the victim and what is the harm done? Everyone must be responsible for his or her acts. This conclusion is just common sense. Unfortunately, the existing legal system requires that all criminal conduct be specifically defined in advance. Therefore new legislation may be needed to punish those unauthorized acts, unless the system adopts a new approach to criminal justice and victim justice (see Chapter 8).

3. If a computer program is used to screen out minorities in employment or housing, does that constitute a computer abuse of civil rights? *Answer:* When a possibly unlawful act is being investigated, an effort should be made to identify all those who are affected so that no victim will be overlooked (see Chapter 8). Therefore the issue here is whether the minorities' civil rights are

violated. If so, then the act, the screening out by means of a computer program, is an abuse of civil rights. Those responsible for the screening out may be guilty. Manual or computer screening should not make any difference; even the extent of the harm may be immaterial. In other words, a violation of a civil right is a violation, regardless of whether there was harm.

4. Should new legislation covering computer-related crime include obliteration, alteration, or theft of computer programs stored in machine- or human-readable form but not "in" a computer? *Answer:* Computer programs generally have a market value, whether the programs are inside or outside a computer. Obliteration, alteration, or theft of a program is an offense if the owner (or other innocent persons) is adversely affected. Even without adverse effects on the owner, such acts, if unauthorized, may still be offenses. Imagine that you are in the waiting room at an airport and your wallet is "in" your hand but your luggage is "outside" of you on the floor. Does it make any difference if someone grabs one or the other?

5. States such as Virginia and Maryland adhere to a common-law tangibility test regarding what constitutes personal property. These laws do not readily encompass computer programs, whether or not such programs are stored in a computer. In other states, the alteration or destruction of computer programs may or may not be sanctioned by mischief statutes. Thus the law of New York State requires damage to be tangible or physical. Is new legislation needed to protect computer programs in those states? *Answer:* A computer program is actually a tangible property, being a collection of computer instructions whose compilation requires time and skill. The law has improved in this respect. That is, damage to intangible property is now legally actionable. It is true that damage to intangible property may be more difficult to establish, but this problem is not unique to computer crimes. In fact, there are other kinds of intangibles that the law must handle, though it is not easy to do so. An example is a person's intent to commit a criminal act. We just have to find the best possible ways to handle the intangibles relating to computers.

6. Some have argued that computer time has no value if it is not being used. Therefore an alleged perpetrator who uses a computer when no one else wants it takes nothing of value from anybody and has committed no crime. Is the argument valid?

Answer: Under the existing legal system, the answer is no. For example, nobody is allowed to hire a locksmith, open the door to a house, and enter, just to take a look inside when the owner is on vacation and is not using the house. So why should an unauthorized use of somebody else's computer be treated differently? I believe the law may be more lenient toward those without malicious intent and with a good excuse. Thus it may be argued that a student has committed no crime if he used a school computer for educational purposes when nobody else was using it, especially if he had a school deadline to meet and no authority was in sight to give him approval. In ancient China, the logic went even further: stealing a book was not considered theft, on the grounds that the thief wanted to improve himself or herself.

7. When an unauthorized person uses most or all of the resources of a computer and keeps other users away, either intentionally or unintentionally, has he or she committed a computer crime? *Answer:* In general, a right to use some kinds of resource or property is not absolute. Even the owner may not monopolize the use, such as in some easement situations. In individual cases, the court decides whether or not an offense was committed, depending on various factors. An important factor is the harm done to the victim. Lack of authorization, presence of intent, and so on may be other factors. In a case where the monopolized property is a computer, special or even unique factors may have to be taken into consideration in order to determine whether a crime was committed. But there is no need and no place for the term *computer crime*. Otherwise there would be automobile crime, book crime, and so on, without end.

By analyzing individual issues, I have shown that there is not much need for new legislation for computer crime, especially if more attention is paid to the harm inflicted on the victim. Now let us look at the situation in general. In a previous section, I listed the

four major categories of computer crimes named by Parker and Nycum (1981, p. 3). What is needed is an emphasis on the harm done to the victim:

1. A computer is not the only thing that can be the object of attack. Almost anything can be the object of attack. In fact, whether or not the object has any value can be irrelevant to the attacker. An example is a victim being attacked for no apparent reason. The current criminal statutes on property should take care of crimes against computers, at least when the target is hardware.

2. Obviously a computer is not the only automated mechanism that can be used to commit crimes. Guns, time bombs, and even automobiles are also automated mechanisms. Turning off automated life-sustaining medical equipment is still considered a crime in many states. In some of these cases, there were no victims because those on the equipment were terminally ill and wanted to die (Prager, 1991). Thus, careful assessment of the harm done is vitally important in criminal justice. That is, perhaps there was no harm done, and no crime was committed. At any rate, as science and technology advance, there will be various types of new and automated mechanisms. In fact, at one time or another, paintings, poems, and even natural gas, coals, and fossil fuel were new forms of assets. Yet no new laws were ever passed to deal with crimes related to them. Also, information like trade secrets and insiders' information are well known as being capable of being stolen or misused, and prosecution of the guilty can be difficult.

3. Even pencils and paper can be used as tools for conducting or planning crimes. Computers may be more efficient tools and may be used on a larger scale. These factors may or may not be considered new problems.

4. Many instruments can be and are used to intimidate or deceive. A toy gun can be and sometimes is used in a holdup. Crimes can also be committed in the absence of an instrument. A bogus M.D. degree is well known to have been used to defraud the public.

Finally, let us take a look at the new statutes on computer crimes in the New York State Penal Code. In some cases, if the

word *computer* is replaced by a more familiar one, such as *automobile*, you have a statute on an old crime, such as larceny. Thus very interesting questions arise: Do we really need a new statute when the change of a few words in an existing statute can cover the new crime? Can we construct a new statute that would cover both the old and new crimes, and even certain types of crime that are unknown and unseen at the present but may arise in the future as a result of advances in science and technology? These and other relevant questions will be discussed in the next section.

THE LEGAL SYSTEM NEEDS MODERNIZATION

Researchers have made suggestions on the types of new legislation that are best for handling computer crimes. They have correctly pointed out several defects in the ways new legislation is being created for a new crime, and they have correctly suggested that, with respect to new technical devices, the emphasis should be on the ways of using them. In my opinion, however, these researchers have failed to identify the root problems and consequently have not offered effective solutions. A substantial problem is that our legal system is outdated in general and needs a modernized approach.

In the days when life was much simpler, there was only a limited number of ways in which an offender could harm a victim. An offense almost always involved clearly identifiable physical movements, and the resulting harm was invariably either a physical or tangible financial loss. Consequently most criminal conduct was originally defined by acts, such as murder, rape, and robbery. Furthermore, because crimes are considered offenses against the state and arbitrary government prosecution is not to be tolerated in a democracy, the procedures of the criminal justice system are very important. The first logical step to ensuring proper criminal justice seems to be to allow no arbitrary accusation. This may explain why criminal conduct is required to be clearly and narrowly defined in advance. Thus larceny is clearly specified as

taking and carrying away the personal property of another with the intent to appropriate it permanently for one's own use (De-laney, 1986, p. 395). The physical movements are the taking and carrying away of certain (tangible) property. The harm is the owner's being permanently deprived of the use of that property.

Defining crimes as offenses against the state is a major cause of injustice to victims (see Chapter 8). The birth of the computer has brought to the surface other serious defects in the traditional ways of legal thinking. Apparently some lawmakers have felt that the computer is an "advanced" tool or property and that therefore a new definition of computer is necessary. This thinking may explain why, in S.240 and H.R. 3970 and in subsequent proposed statutes, *computer* is so carefully defined (97th Congress Session, 1981). Unfortunately, the effort did not do much good, as was pointed out by Parker (1978, p. 3). The strict definition of *computer* does not cover fluid computers and future computers that will be based on new scientific devices. Furthermore, in applying a larceny statute to computer crimes, there will be difficulties. For example, the OECD (1986, p. 40) pointed out the ability of data-processing and telecommunication systems to copy data quickly and inconspicuously. Thus the physical movements in computer crime are very different in nature from those encompassed by a classical definition of larceny. The data stored in a computer (i.e., the property) are never taken and carried away, although the data may be viewed as being "used" for a few seconds. The property being "taken and carried away" is information and is intangible. Also, there is a difference in the way the owner is deprived of the use of the property. The owner certainly continues to have use of it, although the perpetrator now also has access to it.

Significant improvement in the legal system is possible if more attention is paid to the harm inflicted on the victim; for example, a new type of physical harm is the slow and harmful effect of smoking. Paying more attention to the harm done is not a new idea. The law has never emphasized the differences in instruments; thus whether a knife or a stick is used is immaterial. What counts is the seriousness of the physical harm to the victim. This

explains why there are no separate categories for knife, stick, and gun crimes; these instruments are grouped together as dangerous or deadly weapons. This fact also argues against a separate category for computer crime. On the other hand, the law has paid attention to how the offense is committed (with or without an instrument) and, more generally, to the act. At the same time, the legal system has also realized that paying too much attention to the details of acts may not be a good idea. This may explain why the Model Penal Code, finalized in 1962, consolidated crimes such as larceny and embezzlement into a category of theft offenses (Delaney, 1986, pp. 401–402). But the effort did not go far enough. For example, a person is guilty of the theft of movable property if he or she unlawfully takes or exercises unlawful control over the movable property of another person with the purpose of depriving that person of the property. This statute, as it stands, still cannot be applied to computer data copying, as there is no taking or exercise of control.

Now, if we ignore the acts and concentrate instead on the effect on the victim, a simple statute with wide application can be obtained. That is, a person is guilty of theft if he or she unlawfully reduces the value of another person's property. Thus, if someone copies a new computer program written by another and sells it on the market, he or she would have reduced the value of that program to its owner. Even if the copier just keeps the copied computer program for fun, he or she may have infringed the privacy right of the owner and may thus have reduced another type of value to the owner. The same approach may be applied to other properties. That is, instead of the form of the property, we may emphasize the value of the property. A property may be intangible in form, but more often than not, its value is tangible.

Unfortunately, the legal establishment does not seem to like new ways of thinking. Even legal education and training remain old-fashioned (Meyer, 1990). Further, the legal establishment does not seem to understand that other disciplines try to extract similarities from different experiments and, based on them, try to derive general rules and develop unified theories (e.g., Ifill, 1991;

Greenhouse, 1991). Thus "new" cases appear every day and new laws are needed to handle them. Consequently there will continue to be problems until new approaches and ways of thinking are accepted. Thus, in California, the theft of a program contained in a computer's memory could not be regarded as the "theft" of an "article," and a Colorado court refused to regard electronic impulses as tangible property (OFCD, 1986, pp. 41-42).

Finally, it may be ironic to point out that a modern approach to new crimes could be the age-old idea of "harm" versus "excuse." Secret Service agent James Cool reasoned as follows: "When a hacker gets into a system, it's no different from a burglar breaking into your home or office. If the door is open, the law treats a trespasser differently. But if a hacker cracks a password to get into the system, it's the same as kicking in a locked door" (Wilke, 1990, pp. 1, 4). I agree. I think the similarity is the potential "harm" of financial loss, and the "excuse" in that case is the opened door.

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REFERENCES

- Ball, Leslie D. (1982, April). "Computer Crime." *Technology Review*, p. 21.
- Becker, Louise. (1982). *Computer Crime and Security. Issue Brief No. 1B0047*. Washington, DC: Library of Congress, Congressional Research Service.
- Conly, Catherine H., and McEwen, J. Thomas. (1990, January-February). "Computer Crime." *National Institute of Justice Reports*, No. 218, Washington, DC: National Institute of Justice, U.S. Department of Justice, pp. 2-5.

- Delaney, John. (1986). *Criminal Law*. Bogota, NJ: John Delaney.
- Francis, Dorothy B. (1987). *Computer Crime*. New York: Dutton.
- Frankel, Karen A. (1982, April). "Computer in Court." *Technology Review*, pp. 28-29.
- Greenhouse, Linda. (1991). "Evidence a Fleeing Suspect Drops Is Ruled Legal." *The New York Times*, April 24, p. A20L.
- Howlett, Debbie. (1990). "Computer Fraud: A Big-Bite Crime." *USA Today/International Edition*, July 10, p. 34.
- Ifill, Gwen. (1991). "Panel Endorses Waiting Period to Buy Pistols." *The New York Times*, April 24, pp. A1, A16.
- Koba Associates, Inc. (1980a). *Computer Crime: Expert Witness Manual*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.
- Koba Associates, Inc. (1980b). *Computer Crime: Legislative Resource Manual*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.
- Markoff, John. (1990a). "Arrests in Australia Underscore Global Computer Tampering Peril." *The New York Times*, April 4, pp. 1, 16.
- Markoff, John. (1990b). "Computer Invader Is Found Guilty." *The New York Times*, January 23, p. A21.
- Markoff, John. (1990c). "Drive to Counter Computer Crime Aims at Invaders." *The New York Times*, June 3, pp. 1, 30.
- McKinney's. (1988). *Consolidated Laws of New York, Annotated, Book 39, Penal Law*. St. Paul, MN: West Publishing.
- Meyer, Philip N. (1990). "The Failure of Traditional Law Schools." *The New York Times*, September 2, p. F13.
- 97th Congress, 1st Session. (1981). *H.R. 3970*. Washington, DC: Government Printing Office.
- 96th Congress, 2nd Session. (1980). *Hearings on Computer Systems Protection Act of 1979, S/240, Serial No. 96-75*. Washington, DC: Government Printing Office.
- Nycum, Susan Hubbell. (1978). *Hearings on Federal Computer Systems Protection Act of 1977, S.1766*. Washington, DC: Government Printing Office.
- Organization for Economic Cooperation and Development. (1986). *Computer-Related Crime: Analysis of Policy, Information, Computer and Communication Policy Series No. 10*. Amsterdam, The Netherlands: North-Holland Publishing.
- Parker, Donn B. (1978). *Hearings on Federal Computer Systems Protection Act of 1977, S. 1766*. Washington, DC: Government Printing Office.

- Parker, Donn, and Nycum, Susan Hubbell (1981). *Hearings on Federal Computer Systems Protection Act of 1981, H R. 3970*. Washington, DC: Government Printing Office.
- Perry, Robert L. (1986). *Computer Crime*. New York: Franklin Watts.
- Prager, Kenneth (1991). "Physicians Shouldn't Assist Patients in Suicide." *The New York Times*, April 8, p. A14L.
- Wessel, Milton R. (1981). *Hearings on Federal Computer Systems Protection Act of 1981, H R. 3970*. Washington, DC: Government Printing Office.
- Wilke, John R. (1990). "In the Arcane Culture of Computer Hackers, Few Doors Stay Closed." *The Wall Street Journal*, August 22, pp. 1, 4.

Patient–Nurse and Nurse–Patient Abuse

The Well-Kept Secret

ELSIE L. BANDMAN, ED.D., R.N., F.A.A.N.,
AND BERTRAM BANDMAN, PH.D.

INTRODUCTION

Abuse is a serious harm or offense by one or more persons against another person, other persons, or oneself. Abuse violates the victim's rights. Abuse may be direct or indirect, active or passive; and is too often kept secret. Abuse, therefore, justifies interference with the abuser's behavior (Bandman and Bandman, 1990, pp. 106–107).

FACTORS CONTRIBUTING TO NURSE–PATIENT AND PATIENT–NURSE ABUSE

The history of nursing is one of a struggle to provide at least minimum conditions of decent patient care to the ill and infirm.

The effort began with early religious orders devoted to the nursing of society's rejects. The struggle extended through Florence Nightingale's battles with the English War Office to permit the presence of women nurses in Crimean hospitals in the 1850s. Today, nursing care includes the broader concept of health care to **everyone as a matter of right.**

The quality of that care has recently been subordinated to the overriding consideration of serving sheer numbers of people in need of basic nursing care. Patient care had previously been largely subsidized by nurses, who worked long hours for minimal wages, under persistent conditions of insufficient staffing. The exploitation of student nurses in hospitals was another way of getting cheap labor for the health care enterprise. Such abuse is inexcusable.

The nurse-patient relationship is not an easy one. Patients are sometimes difficult to motivate to behavior that is in their own best interests. Patients' appreciation of nurses is usually short-lived. Regardless of how taxing, dedicated, and compassionate the nursing care is, physicians customarily receive the lion's share of both the credit and the fee for patient services. Nursing units are frequently understaffed. Committed nurses work overtime, for which they receive little recognition or salary, on the pretext that nursing care is poorly organized and excessively personalized. Nurses become fatigued from long hours and years of demanding work, for which they receive little beyond a modest livelihood. In short, nursing is less often heroic than it is grueling, complex, and exhausting. The persistent shortages and inevitable priorities of a health care system do not provide adequately for the working out of the human relationships of strangers thrust into a milieu of intimacy and need, fear and expectations, short supply and high demand.

These factors contribute to difficulties in nurse-patient relationships, and make nurse abuse of patients and patients' abuse of nurses wrongly accepted as predictable and understandable. Despite this general attitude, there is also an insidious, underlying two-way patient and nurse abuse that remains a well-kept secret.

PATIENTS' AND NURSES' "HANDS-ON" ABUSE

The most serious and obvious act of abuse occurs when one individual makes physical contact with another without the latter's consent. Such contact has been called *hands-on* or *contact abuse*. For example, a patient in a long-term facility was reported to have flown into a rage and to have scratched the face and arms of a female nursing assistant to the extent that the nurse required treatment in the emergency room (Rizzo, 1978). In another facility, a paraplegic patient was reported to have attacked a male nurse by holding and hitting him so hard that the nurse fell to the floor along with the patient, who continued to hit him (Gordon, 1978).

Psychiatric patients commit more abuses against fellow patients and nursing staff members than do nonpsychiatric patients. Major reasons for psychiatric patients' attacking others include their thought disorders, their high levels of anxiety, and their consequent misperceptions of persons and events. A major challenge to the health care professional is to explain to a nursing student whom a psychiatric patient has just picked up and hurled to the floor that this act of abuse may have been a case of mistaken identity. Even more difficult is to help both the nurse and the patient to understand the thoughts and feelings that contributed to the violence (Fontaine, 1987, pp. 510, 511–560).

Patients who are prone to impulsive behavior need reduced anxiety through appropriate nurse–patient interaction. Substituting large doses of chemical restraints (medication) for nurse–patient interaction creates a tension between patients and nurses. In some cases substituting chemical restraints for nurse–patient interaction may seriously violate the patient's moral and legal right to decide whether to obtain or refuse treatment. A heavily medicated patient may not be aware of his or her treatment options.

The unnecessary use of either excessively large or prolonged doses of tranquilizers is in itself an act of abuse. Staff unwillingness to carefully deliberate, assess, design, and implement a nursing care plan for dealing with angry, sometimes violent patients is a further instance of abuse of power by high-level

hospital decision makers. Although careful design and implementation of appropriate nursing plans do not ensure improved nurse-patient interaction, joint staff efforts to remedy nurse-patient problems are apt to be helpful.

The abuse that occurs is not only of nurses by patients. Patient abuse by nurses also occurs. The more dramatic but less frequent examples of nurse abuse of patients are those in which a nurse strikes a patient or applies unnecessary force in an attempt to restrain a violent patient. A recently reported case in litigation in Buffalo is that of a psychiatric nurse who restrained a patient by forcefully putting his arm around the patient's neck, the patient died as a result. A further form of abuse by institutional personnel is the failure to provide sufficient staff members to ensure the safety of both patients and nurses. There are reported instances in which devoted psychiatric mental-health nurses resigned their positions because of persistent patterns of inadequate staffing and the consequent dangers to themselves and all the other members of the therapeutic community.

One social worker, for example, wrote:

A young patient, badly bruised and bleeding, accidentally wandered into the ombudsman's office at a state mental hospital in Pennsylvania. Asked what happened, she said two staff members had thrown her to the floor, kicked and gagged her, and hit her in the head with a clipboard. Horrified ombudsman staff volunteers investigating for the hospital were later told the patient injured herself resisting medication. (Armstrong, 1978b, p. 348)

ABUSES AGAINST NURSES AND ALLIED HEALTH PROFESSIONALS

Patients also inflict abuse on allied health professionals. As one recent mental health report points out, "Frequently, patients

and residents are more likely to injure staff members than to be injured by them" (Armstrong, 1978b, p. 349). Daniel Schwartz (1986), a sociologist and hospital administrator, recounts how patients abuse nurses by spitting at them, hitting them, and speaking abusively toward them, either by making sexually derogatory remarks, by making "racial slurs" (p. 279), or by treating a nurse as a pair of hands or feet. According to Schwartz, if a patient uses a racial epithet, thereby treating a minority staff member disrespectfully, "It may be very difficult for that staff member to respect the patient" (p. 279).

Barbara Armstrong (1978a) cites a chilling example of a client abusing a health professional. A psychiatric technician, John Marr, was on duty on a minimum-security ward in Saint Elizabeth Hospital in Washington, D.C.:

But when the day was over, John Marr was dead with three bullet wounds in his face. His assailant was a patient, later found not guilty by reason of insanity, who had somehow smuggled a gun into the ward. (p. 463)

ABUSE OF PERSONHOOD

An equally pernicious form of abuse is a well-kept secret. We refer to the demeaning of personhood through various forms of psychic and physical distance from the patient. The most insidious way to exhibit contempt for a person may be to ignore him or her and to withdraw from that individual on the grounds of chronicity of illness, social class, age, race, religion, sex, education, or ethnic membership. The client thus shunned becomes isolated, withdrawn, and defensive. The loss of self-esteem is serious. The feeling of hopelessness and helplessness may become oppressive. The person discriminated against lacks both the knowledge and the power to combat the ever-widening distance between himself or herself and the care providers. Moreover, the

client suffers from the deprivation of health care services because of low staff priority or suffers even from complete staff withdrawal. These deprivations can be seen most acutely in forms of "benign neglect" of the aged. One also notices the low quantity and quality of verbal interactions of care providers with patients who are of low economic status or who have limited verbal skills. Staff members' withdrawal can be seen in instances of complaining or difficult patients, which may be due to differences in class and socioeconomic status. Some writers on abuse also correlated hospital suicide rates with those who are poor, or who are victims of social disparagement (Hickman, 1984, p. 293; Vanderschaeghe, 1986, p. 13).

Nursing students reportedly observe the differences in the physician-patient relationships of medical staff members who rotate between a university-medical-center hospital and a neighboring public hospital. In the medical school hospital, medical staff members treat patients with considerable courtesy. In the public hospital, the same medical staff members demonstrate impersonality and impatience in their relations with patients. Patients in the public hospital suffer from stigmatization and identification as members of a lower socioeconomic class. These same patients are also apt to be members of racial or ethnic minority groups, and sometimes these people have broad gaps in their knowledge of adequate health care practices. The presence of dual health-care-delivery systems in large urban areas, one for the poor and one for the rich, is another form of institutional abuse. Systematic abuse lowers the self-respect of consumer and provider alike (Vanderschaeghe, 1986, p. 13).

Patients who fail to show either appreciation of or compliance with nursing-care-plan expectations may also be the object of provider withdrawal. Chronically ill or dying patients who display anger or hostility toward staff members may also be avoided, even though these patients are in dire need of support and assurance of continued interest as long as they live. Patients who are disfigured, scarred, or mutilated, or who smell because of incontinence or the disease process are too often treated as less than human.

Our habit is to think of abuse as active and direct. However, abuse may be the result of undertreatment and negligence as well. Nonaction may be as abusive, in the sense of resulting in physical or emotional harm, as action or treatment. We can violate a client's rights by neglecting the client.

Leah Curtin (1978), a national leader in nursing and a nursing ethicist, tells of an almost hidden form of abuse in her own experience as a professional nurse: Her account is presented in a case study of "systematic violence" (p. 17). Curtin worked in an intensive care unit (ICU). Dr. Y, a resident assigned to acute medicine, made rounds daily. According to Curtin:

He often changed medications as frequently as he made rounds. Our first clash came over a heart patient who was on numerous medications including digitalis, a diuretic, tranquilizers, a blood thinner, and a blood pressure depressant. The patient appeared to be doing well physically but he was felt to be "a difficult and demanding patient." Dr. Y emerged from the patient's room one day obviously angry and discontinued all medications effective immediately. I questioned this order and was told to "mind my own business." (p. 17; see also Curtin and Flaherty, 1982, pp. 183-185)

This process of patient neglect went on for three days, with Curtin calling the chief of medicine, until Dr. Y relented and started the patient back on his former medications. A second clash occurred, Curtin tells us, "over a patient for whom Dr. Y ordered nine times the normal dose of corticosteroid to be given six times a day." When Curtin questioned the doctor, he said, "I ordered you to give it." Curtin refused to comply; other nurses gave it unquestioningly (Curtin, 1978, p. 17). A third clash involved a patient with gout. "Dr. Y ordered some twenty times the normal dose of colchicine through a combination of oral and intravenous routes." Despite Curtin's objections, the medication was given. As a result the patient suffered "severe nausea, uncontrollable diarrhea and subsequent dehydration" (p. 18; Thompson and Thompson, 1985, p. 201). Curtin reports that the final clash involved a forty-five-year-

old white male admitted with scleroderma. Dr. Y decided to use an experimental drug that is administered intravenously. A side effect of this drug is respiratory failure. "According to Hospital policy an experimental drug administered intravenously must be given by a physician. Consequently, Dr. Y administered the drug himself" (Curtin, 1978, p. 18). According to Curtin:

On the day in question, Dr. Y requested the medication. I unlocked the medicine cupboard and gave him one vial of the drug. He demanded two vials. Again I questioned him, but was told that he merely wanted to check one for potency (the drug was unstable). . . . I gave him both vials but I wasn't comfortable. That evening when I returned to work . . . I was told the patient died of respiratory failure. (p. 18)

Curtin asked to be present at the autopsy, but she was told that there would be none on this patient. She was transferred to the tuberculosis ward. She later learned that "Dr. Y had lost his license to practice medicine in this state and was gone" (p. 19).

Dr. Y's indirect two-way abuse was against the patient and against Curtin. She tells what upset her the most: "Of all the things that happened, I was most bitter about what appeared to me as a cover-up for Dr. Y and that my colleagues in nursing not only went along with the cover-up, not only would not help me, but actually helped to victimize me." Leah Curtin resigned from her position firmly believing that "Dr. Y had killed that man. I was sure of it, but I couldn't prove it. All the evidence was gone" (p. 20). She graphically illustrated abuse as a well-kept secret.

The late Morris R. Cohen (1950), a celebrated American philosopher, shows how omissions and failures to do what is avoidable, although not as dramatic as brutal, cold-blooded murders, for example, may have identically harmful results. He writes that "there is something horrible about killing a man or woman and that the state should maintain the supreme value and sanctity of human life" (p. 57). He reminds us, however, that "no one has consistently" maintained "the view that under no circumstances

may a life be destroyed." He cites some examples, such as self-defense, in killing "a bandit who attacks us" (pp. 57-58). "Most people," he says, "glorify the killing on a wholesale scale of those with whom we are at war." Cohen then cites crucial examples of omissions equaling commissions. "We allow automobiles to kill" many thousands of people "every year, which we well could prevent by foregoing the convenience it offers" (p. 58). Cohen offers other examples: "We also allow people to be killed by mine or factory accidents or through undernourishment, when we could prevent such killings by definite though expensive social measures" (p. 58). Cohen suggests that our revulsion "against murder is rather against direct and messy forms of it" (p. 58). He then cites Balzac, the French writer, who asked this question, "If you could inherit a great fortune by killing a Mandarin in China by just blinking your eye when no one could see you do it, would you do it? In any case," Cohen says, we kill people "by economic conditions, which compel men to undertake such work as housewrecking where the mortality is sometimes as high as twenty percent per annum" (p. 58).

ABUSE AS A VIOLATION OF RIGHTS

If a serious harm is a violation of a right to a person, as we believe it is, one may identify and regard both direct and indirect abuse not only as serious harm but also as a violation of rights. One may therefore refer to nurses' and patients' abuses of one another as violations of one another's rights.

A right has been variously defined as power, privilege, immunity, interest, permission, claim, or valid claim. We identify a right as a justified option to act, claim, or receive one's share in accordance with rational principles of moral, political, and legal justice. (Feinberg, 1973, p. 67)

Rights have several practical functions (Winston, 1989, pp. 37-39). One function of rights is to expose and resist abuse. A

related function of rights is to help settle disputes fairly, and thus, in effect, to minimize abuse. If rights function to settle disputed claims fairly, occasions for invoking rights arise only when there are disputes or conflicts between people. Robinson Crusoe had no use for rights until Friday and others arrived on the island to dispute who owned the coconuts on the trees (Defoe, 1960, p. 236). The view that rights settle disputes identifies rights with justice, power, and sovereignty. The right to rule, then, is among the first of rights, whether it is ruling the state, a community, a hospital, or one's body. One's right to rule, however large or small one's dominion, also depends on one's right's being a fair right. If the exercise of one's rights is fair, it protects people against abuse.

A right is as strong and enforceable as a society is willing and able to make it. But within limits, a right affords a person a dominion, with keys to lock or unlock the doors, a dominion that others are precluded from trespassing on. One's "right of dominion" may be over one's car, which permits and requires the driver to observe green and red traffic lights on a fair basis. Or the dominion may be one's home or one's body. Viewed in this way, rights enable people to treat one another unabusively. Rights as dominion also enable people to form treaties or agreements with others free of bloodshed and abuse, and they provide an important conceptual link with being a person in society. By recognizing a right, a society says, in effect, that it will use its resources to protect people against abuse and that it will regard breaches of one's rights with public disapproval, and with restraints imposed on abusers.

Having rights is to be treated, as Immanuel Kant (1983) pointed out, not "as a means only but also as an end" (p. 36). Having rights implies that, if one is abused, treated as a means, mistreated, untreated, or undertreated, one is put in a position to claim appropriate restitution. The violation of rights triggers a further right. As Joel Feinberg (1980) points out, "For every right, there is a further right . . . to claim" one's right (p. 141).

CONCLUSION

Rights justly entitle a person to the means of achieving rightful protection against rights violations. To have rights is to have effective social and legal mechanisms and forms of insurance against abuse. To have rights is to be in a position to expose, confront, and prevent rights violations.

Nurses as advocates see themselves as correcting the injustices and abuses committed by the health care system against clients stigmatized by ethnicity, age, sex, race, and socioeconomic status. As we have held:

For a supportive environment of justice, the [nurse] protects the client's rights and facilitates the client's effort to arrive at his or her own conclusions about health care. (Bandman and Bandman, 1986, p. xi)

In its first provision, the 1985 American Nurses' Association's *Code for Nurses* in effect reaffirms Kant's practical imperative to treat all persons as ends "and never simply as a means" (Kant, 1983, p. 36). The Code for Nurses directs the nurse to provide nursing care with due respect for the individual's dignity and freedom, and on the basis of equality, without restrictions as to social, economic, personal, health, or disease limitations (*Code for Nurses With Interpretive Statements*, 1985, p. 1). The third provision of the code defines the nurse's role as a patient's advocate whose:

primary commitment is to the health, welfare and safety of the client. As an advocate for the client, the nurse must be alert to and take appropriate action regarding any instances of incompetent, unethical or illegal practice by any member of the health care team . . . or any action on the part of others that places the rights or best interests of the client in jeopardy. (p. 6)

If the nursing profession practices Kant's two imperatives, to universalize one's acts and to treat oneself and others as ends, not solely as means (Kant, 1983, pp. 30, 36), then it works to correct those conditions of nursing care and staffing that perpetuate nurse-patient abuse and that sustain such abuse as a well-kept secret. Abuse is too often left unexposed to the light of public and professional scrutiny (Thompson and Thompson, 1985, pp. 200-202).

Finally, nurses have special rights and privileges to advocate for their patients because of their special responsibilities in matters affecting their patients' health care. Nurses can exercise independent judgment to correct abuses only if they have a right to do so. Nurses are partners of patients and regard themselves and their patients as ends, not as means only. Nurses have a special right to assert this form of autonomy amid the vast and tangled web of the health-care-delivery system. Nurses are otherwise powerless to expose and confront, and also to minimize and preterably prevent, abuses.

REFERENCES

- Armstrong, B. (1978a, July). "Handling the Violent Patient in the Hospital." *Hospital and Community Psychiatry*, 29(7), 463-467.
- Armstrong, B. (1978b, May). "A Question of Abuse: Where Staff and Patients' Rights Collide." *Hospital and Community Psychiatry*, 30(5), 348-351.
- Bandman, E., and Bandman, B. (Eds.). (1986). *Biomedicine and Human Rights: A Reader for Health Professionals*. Lanham, MD: University Press of America.
- Bandman, E., and Bandman, B. (1990). *Nursing Ethics through the Life Span* (2nd ed.). East Norwalk, CT: Appleton-Lange.
- Code for Nurses With Interpretive Statements. (1985). Kansas City, MO: American Nurses Association.
- Cohen, Morris R. (1950). *Reason and Fate*. Glencoe, IL: Free Press.
- Curtin, L. (1978). "Case Study: Systematic Violence." *Journal of Nursing Ethics*, 1(1), 17-21.

- Curtin, L., and Flaherty, J. (1982). *Nursing Ethics, Theories and Pragmatics*. Bowie, MD: R. J. Brady.
- Defoe, D. (1960). *Robinson Crusoe*. New York: Signet.
- Feinberg, J. (1973). *Social Philosophy*. Englewood Cliffs, NJ: Prentice-Hall.
- Feinberg, J. (1980). *Rights, Justice and the Bounds of Liberty*. Princeton: Princeton University Press.
- Fontaine, K. (1987). "Violence." In J. Cook and K. Fontaine (Eds.), *Essentials of Mental Health Nursing*, pp. 510-560. Reading, MA: Addison-Wesley.
- Gordon, M. (1978). Comments as Ethics Committee Meeting of New York State Nurses' Association, Albany, NY.
- Hickman, I. (1984, March-April). "Descriptive Differences between Black and White Suicide Attempters." *Issues in Mental Health Nursing*, 6(3).
- Kant, I. (1983). *Ethical Philosophy*. Indianapolis: Hackett.
- Rizzo, J. (1978). Comments at Ethics Committee Meeting of New York State Nurse's Association, Albany, NY.
- Schwartz, D. (1986). "The Patient's Bill of Rights and the Hospital Administrator." In E. Bandman and B. Bandman (Eds.), *Bioethics and Human Rights: A Reader for Health Professionals*, pp. 277-279. Lanham, MD: University Press of America.
- Thompson, J., and Thompson, H. (1985). *Bioethical Decision Making for Nurses*, East Norwalk, CT: Appleton-Lange.
- Vanderschaeghe, I. (1986, January). "Child Abuse and Community Mental Health Practice." *Canadian Journal of Psychiatric Nursing*.
- Winston, M. (Ed.). (1989). *The Philosophy of Human Rights*. Belmont, CA: Wadsworth.

Justice for Health Consumers and Providers

BERTRAM BANDMAN, PH.D.,
AND ELSIE L. BANDMAN, ED.D., R.N., F.A.A.N.

INTRODUCTION

A rational conception of justice is one that reconciles the claims of need and merit on the basis of fairness, freedom, and equality. Such a conception respects every individual's rights to autonomy and well-being (Bandman & Bandman, 1990, pp. 106–107; 172).

After noting some avoidable conditions of injustice that affect the therapeutic encounter between health consumers and health providers, with special emphasis on nursing, we consider several competing conceptions of justice. The role of each of these conceptions is examined in an attempt to provide a defensible concept of justice. Finally, these principles of justice are applied to alleviate injustice in therapeutic encounters between health providers and consumers.

CONDITIONS OF INJUSTICE IN HEALTH CARE

One notes three kinds of injustice in health care: (1) too little patient care; (2) social and economic disparities in health care

delivery; and (3) social and economic disparities in levels of competence and compensation among health professionals.

Too Little Patient Care

"The most basic complaint which underlies and contributes to all other problems of patient care is that of short help, poor salary, and poor working conditions [that] lower morale" (Stein, 1978, p. 27). The effects of staff shortages and poor working conditions are reflected in patients' complaints. A patient suffering from radiation sickness says, "I waited two hours to be treated in the X-ray department." A patient admitted for abdominal pain says, "The intern didn't come in to see me about my pain until after midnight." A patient with a body temperature of 102° says, "I waited three hours to be seen in the emergency room."

A common consequence of staff shortages is the unnecessary deaths of, or risks to, patients because of lack of sufficient direct observations of and immediate responses to changes in a patient's condition. A frequent example is the aged patient who falls and fractures a hip getting out of bed in the effort to spare the overworked nursing-staff members providing a bedpan. A fairly frequent result of staff shortages is the avoidable death of a patient from a cardiac arrest because of nurses' involvement with other patients, newly admitted, in pain, in crisis, or simply in need of emergency care. The dying are almost always deprived of nursing comfort because of staff shortages. The grim and difficult-to-deny reality characteristic of the nursing care given in too many institutions is that nursing-staff members must analyze the total nursing needs of the patients on a given unit and then allocate personnel, levels of ability, time, and material resources according to the priorities of disease acuteness, seriousness, potential for recovery, or extensiveness of nursing and medical needs. All needs cannot be met. Here the "needs" principle, if used alone, collapses.

Medication and procedural errors are further consequences of the pressures of too many patient requirements compressed into too little time. One hears of medication errors, even in large,

prestigious medical centers, in incidence rates that are too high to be morally permissible. False reports of laboratory tests not actually performed are reported to happen more frequently in those marginal institutions that are run for profit, or that are publicly supported and provide care to the undervalued and underserved poor, aged, and minority ethnic groups in large cities. Major errors, such as the surgical removal of the healthy kidney or leg, or surgery on or X-ray of the wrong patient, are carefully concealed, particularly if the patient dies as a consequence and another cause of death can be found. An aim of such concealment is to prevent expensive lawsuits.

Social and Economic Disparities in Health Care Delivery

Another blatant and frequent form of injustice is the insufficient numbers of physicians, nurses, and technical staff members in rural communities and inner cities throughout this country. These shortages may constitute the difference between life and death for an individual, a group of persons, or a community. In cases of disaster, the coordinated activities of qualified health professionals backed by sufficient supplies of blood, plasma, drugs, and surgical and medical facilities result in great differences between larger and smaller losses of life. A poor rural community without such resources is doomed when tornadoes, hurricanes, earthquakes, or other unexpected disasters occur. In contrast, a sports event like the Indy 500:

requires elaborate and sophisticated facilities. To accomplish this, approximately 400 medical personnel, 11 ambulances, helicopters, 280 firemen, a 30 bed truck hospital and a communication network that includes a hook-up with the nearby hospital's emergency rooms, are utilized. (Kolbensschlag, 1975, p. 32)

In numerous rural, poverty-stricken areas of this country, the most basic elements of health care, such as a physician, a nurse, a

hospital, and an ambulance, are lacking. Children are born, are reared, and grow into adulthood without the preventive health care measures necessary to optimum health and without the treatment of the common killers, such as hypertension and diabetes.

Social and Economic Disparities in Levels of Competence and Compensation among Health Professionals

A third injustice in health care concerns unfair social and economic disparities between levels of health professionals. The high income secured by physicians in prosperous suburbs and large cities results in the persistent maldistribution of physicians. Poor and isolated communities can neither attract nor retain physicians. A feasible alternative for such communities is the primary-care nurse practitioner. This primary-care role is assumed by professional nurses trained to accept responsibility for the client at the first contact in an episode of illness. Additionally, the primary-care nurse practitioner assumes the responsibility for continuity of care and for appropriate referrals (Holleran, 1976, p. 44).

Despite the critical need for professional nurse services in rural and impoverished areas, the American Medical Association opposes both the development of the primary-care nurse practitioner and third-party payments for such nursing services, such as voluntary or governmental insurance plans. Third-party payments would give nurses a fair return for services in lieu of either insufficient or no fees from poor patients. The representative of the Georgia Delegation to the American Medical Association criticized college-based nursing programs for the proliferation of nurse practitioners and "questioned the quality of care rendered by nurse practitioners in some of our rural communities where supervision may not be adequate" (Kuehn, 1979, p. 9). In no way does the accuracy of these charges and the implied superior quality of physicians' services to those of nurse primary-care practitioners detract from the critical need for health care

services and the search for the economic causes of unequal medical care.

Despite the unwillingness of physicians to serve rural communities, the medical profession as a whole refuses to allow qualified nurses to be recognized and to be compensated adequately for these front-line services. The economic monopoly of the American Medical Association on this score is evident. Physicians maintain their social and economic advantages at the expense of nurses, who, by comparison, are unfairly subordinated in status, authority, income, and recognition.

The costs of health care services "have increased at a faster rate than . . . other goods and services" (Holleran, 1976, p. 44). For example, physicians' fees rose 11.8 percent in 1974 (Holleran, 1976, p. 44). Holleran attributes these conditions to the ability of the physician both to determine the supply by selecting and providing the services rendered, and to create the demand by diagnosing and identifying the services needed.

Whereas physicians developed a model of private practice with fees for services, other health professionals went the "institutional route." Nursing, which developed historically within the religious orders, later flourished in well-established hospitals and hospices for the poor, the orphaned, the aged, the dying, and, often enough, lepers, on totally charitable grounds. Today, nurses, as well as an array of technicians and therapists, are relegated to the status of institutional employees, functioning within prescribed institutional policies and procedures, which provide little opportunity to meet the individual patient's needs and desires. These professions are conducted without any exchange of fees between provider and client. Whether the patient is hospitalized or at home, only the physician (with rare exceptions) is directly paid for the services rendered to an individual. All other health professionals are paid by the institution and do not control the fees.

Third-party payments for services to a client are largely in the control of the insurance companies, which, we believe, are largely under the control of the American Hospital Association. This organization serves the physician.

A related disparity concerns the role of physicians and other health professionals in the authority structure of the hospital. Although there is a degree of independence between the members of the health care professions, the health care system may be depicted as a pyramid with the physician at the apex. The physician depends on the assistance of an average of fourteen to eighteen professional workers, of whom the physician is in charge for the critical procedures and implementation of the physician's medical directives, such as the administration of drugs, X-rays, wound dressings, and irrigation, as well as the observation and reporting of patients' response to treatment. At the same time, some health professionals who display merit as nonphysicians are given inadequate opportunity for upward mobility.

The conditions of injustice in health care, with special reference to the perspective of nursing, then, are (1) too little patient care because of an overload of patients in relation to health providers, which results in inadequate, unsafe, ineffective nursing care for patients; (2) disparities in health care services due to social, economic, and geographical circumstances, and (3) economic disparities between physicians and other levels of health workers. All three conditions of injustice in health care give rise to unfair discriminatory selection that leaves too many patients untreated or undertreated and too many health professionals unjustly used and compensated. The foregoing litany of injustice reveals gross unfairness and requires a diligent search for and application of rationally defensible principles of justice.

COMPETING CONCEPTIONS OF JUSTICE

The Need for Justice

Philosophers with diverse views have recognized the nature and importance of justice, despite their conflicting interpretations of justice. To John Rawls (1971), "Justice is the first virtue of social institutions" (p. 3). To other philosophers, justice, although impor-

tant, is coequal with other virtues, such as benevolence, love, and happiness (Frankena, 1961). To Aristotle (1962), friendship is important along with justice (pp. 215, 231–232). To Hume (1902), the value of justice depends on its usefulness to society: "Human nature cannot by any means subsist without the association of individuals; and that association never could have taken place were no regard paid to the laws of equity and justice" (p. 206). In this view, justice is not preserved for its own sake; it is not the end or purpose of social life. It is, however, necessary for human association. Justice is something a person needs in dealing with others (Foot, 1978, pp. 110–131). These views assert the necessity of justice, either as logically contingent on or as coequal with some other virtue, such as happiness or beneficence. Each view asserts that justice is essential to the survival, association, and well-being of human beings.

Merit Versus Need

A prominent move in the effort to clarify the concept of justice was started over twenty-five years ago by Perelman (1963). Other writers, such as Outka (1988), in bioethics, followed Perelman's lead. Their approach involves listing several competing conceptions of justice and then arguing why one or the other of these conceptions is right or wrong. These competing conceptions of justice may be identified as the difference between the case for justice as proper reward for merit and the case for justice as proper consideration for equal need, each case having its arguments and counterarguments (Bandman and Bandman, 1986). Robert Nozick (1974) defends the merit requirement to reward socially worthwhile work with minimal interference in one's liberty (p. 26). Stanley Benn (1967) defends the equal-needs requirement, which means that all persons do not get the same, although equal consideration is given to their needs.

The definition of justice as giving to each person in need on a roughly equal basis, however, suffers from a serious defect: it does not explain how there will be enough to go around. On the other

hand, to define justice as giving resources only to those who deserve them suffers from an unconscionable unfairness. This position does not justify the exclusion of so many by giving the lion's share of health care resources to a small number of persons who are judged "deserving." (One may note, for example, the unfair distribution of health care resources in the AIDS crisis, especially in prisons.) Yet, in each of these views, one may find the basis for remedying its essential defects.

An Attempted Resolution of Competing Conceptions of Justice

Justice as Harmony. To resolve differences between the appeal to merit and the appeal to need calls on us to consider Plato's conception that justice is the harmony of the parts (Plato, 1974, pp. 85, 107). Rawls's discussion (1971, p. 3) of the priority of justice over every other virtue is reflected in Plato's conception that justice is the harmony of all virtues, both in the individual and in society.

Justice is the rational ordering of priorities in social relationships. Justice is the pilot and the benchmark that regulates the conditions of social institutions. Justice as harmony regulates the relation between the conflicting claims of need and merit. For justice as harmony provides a rationale for the appropriate roles of need and merit. There is justice only if there is a harmonizing of the claims of need and merit. The physical counterpart of the harmony of need and merit is health and well-being.

Equal Consideration of Needs. Some people argue that to expect the principle of justice to provide for the needs of everyone is a utopian aspiration. Maurice Cranston (1973), for example, argues that the right to free health care, to maternity benefits, to an education, to a job, and to "periodic holidays with pay" is a practical impossibility in an impoverished country, such as India, for example (p. 67). And Joel Feinberg (1973) points out that if there are not enough jobs to go around, then not everyone can have a job (p. 95).

How, then, is one to fill all these needs? With reference to Feinberg's example of too few jobs to go around, a solution is to call for institutions and governing bodies to divide the jobs, as some people say Jesus did with the loaves and fishes (Matthew 14:16–20). For those who prefer a secular analogy, one rations resources, which may include relevant job benefits. The redistribution of resources, giving equal consideration to everyone's needs, coincides with the moral intuitions of people who call for at least approximate equality, bearing in mind Aristotle's injunction (1962) to treat equals equally, and recalling that by equal Aristotle meant approximately equal (pp. 141–142).

Football coach Vince Lombardi was said to be the essence of fairness: "He treated us all the same, like dogs" (Feinberg, 1973, p. 98). One is more apt to accept adversity if it is distributed equally, as is illustrated in the equal use of air-raid shelters or in the equal issuance of rationing stamps in wartime.

Equality of consideration is a necessary condition of justice, but other considerations are also necessary. Justice as the harmonizing of need and merit calls for more than the distribution of equal shares. What can this be?

The Principle of Material Adequacy. Filling needs justly calls for the production of abundant shares. If a slice of bread is divided equally among fifty people, each person will receive crumbs. An imaginary thought experiment may help to reveal the relation of justice to adequacy and reveals a resulting dilemma of justice. One imagines two concentric circles, the outer circle being considerably larger than the inner circle. One uses the smaller circle to denote all those who could live adequately and harmoniously together (Bandman and Bandman, 1990, p. 155). The result of a small circle's denoting social and economic contentment within a larger circle, however, is that the remaining people in the outer circle have little or nothing to share. They are excluded from the distribution of what Rawls calls the "primary goods" we all need for subsistence, such as food, clothing, shelter, education, and health care.

If we instead make the smaller circle larger, so as to include more previously excluded people, all those within the newly expanded inner circle will then have smaller shares. As the inner circle approaches the outer circle in size and consequently includes more and more people, the newly expanded circle will contain fewer material resources for every individual within the inner circle. To give already scarce resources, including those in health care, to too many people makes the material rations that people receive even thinner than they now are (Bandman, 1986, p. 55). There isn't enough to go around.

If the principle of the roughly equal distribution of needs becomes global policy, each human being, in effect, will receive an inadequate amount to sustain herself or himself. The result cannot be justice in the sense of harmony among all persons. The reason is that material adequacy, a necessary condition of justice, is not met.

The dilemma of deciding the meaning of justice is to find a harmonious relation between these concentric circles. The problem of achieving justice depends, in part, on distributing shares fairly and also, in part, on providing sufficient shares to distribute. The achievement of justice is portrayed by drawing the inner circle, representing those with adequate shares, to coincide with the outer circle, which represents those with formerly inadequate shares. If the newly formed outer circle no longer excludes anyone and, at the same time, provides ample shares for everyone, so that everyone achieves a modicum of well-being, then justice as harmony is achieved. The condition of distributing materially adequate shares is then satisfied. A possible difficulty is that the forcible redistribution of material by society results in reduced motivation to produce material adequacy. This problem gives rise to the role of merit and its appropriate recognition in society.

Merit. How does one achieve material adequacy in health care? One condition of justice as harmony, in relation to the alleviation of scarcity, seems to be to require appropriate recognition and encouragement of individual merit. Meritorious achieve-

ments help promote material adequacy. An example of merit in health care is Alexander Fleming's discovery of penicillin (Copi and Cohen, 1990, p. 370). Meritorious achievements of this kind contribute to people's having materially adequate shares or "primary goods," which they need in order to have a life of well-being (Griffin, 1988, pp. 163–191, 307). A reason to value merit and to nurture the processes of its development is that it contributes to material adequacy. As Rawls (1971) expressed it, every person needs "primary goods," whatever else that person needs (pp. 90–96).

The Role of Merit as an Intermediary Goal. A useful distinction to make is between ultimate goals and intermediate goals, for a person or a society may not always (if ever) achieve an ultimate goal immediately. So intermediate goals serve as stepping-stones for arriving at ultimate goals. In this connection, one may apply John Dewey's means–ends continuum (1939, p. 33, 34–50) to the relation between the ultimate and intermediate goals. To achieve the ultimate goals of justice as social harmony and justice as giving equal consideration to everyone's needs depends on achieving the intermediate goals of material adequacy, or "primary goods," and appropriate recognition and development of merit.

Although some goals, such as recognition and development of merit and provision for material adequacy, are ostensibly subordinate to justice as harmony and to justice as equal consideration to needs, applying the means–ends continuum shows that the ultimate goals are achievable only through the achievement of the subsidiary goals. There is no scheme of priorities in which some values override or cancel others. Each value has its place in the structure of justice. To have enough shares to distribute depends, as a matter of fact, on appropriate recognition and development of merit.

Some advocates of merit argue that the price of rewarding merit overrides the principle of giving equal consideration to need. But one may respond to this argument by adopting a principle used by Benn and Peters (1957), who hold that "there are some

sorts of 'worth' for which rewards in terms of income seem inappropriate. Great courage in battle is recognized by medals, not by increased pay" (p. 139). A social system may similarly provide appropriate public recognition and remuneration to motivate others to attempt to emulate exceptionally meritorious practices. As Joe Feinberg (1973) remarks, "There is something repugnant, as Socrates and the Stoics insisted, in paying a man to be virtuous" (p. 113). Virtue sometimes rewards the virtuous; and there is a virtue as well in generating large numbers of such occasions. People seek prizes and honors. But virtues of the kind displayed by Mother Theresa do not always predominate in a society that does not value the acts generated by such virtues.

Justice as harmony consists in giving approximately equal consideration to everyone's needs. Achieving this set of ultimate goals depends, in turn, on providing for material adequacy or "primary goods." Achieving material adequacy, in turn, depends on recognizing and developing merit. As Dewey's (1939, p. 33) means-ends continuum consists of principles and activities that work together, ultimate and intermediate principles of justice also work together. To paraphrase Kant (1950), ultimate principles of justice without intermediate principles are empty, and intermediate principles without ultimate principles are blind and purposeless, (p. 93). The principles of justice as harmony are put into practice through intermediate principles, which are the conditions for achieving justice as harmony. The conflict between need and merit is resolved by appealing to justice as harmony. The principle of harmony reconciles the roles of need and merit. The principles of need and merit are strengthened, in turn, by a recognition of the principle of material adequacy. There is a dynamic relation between these principles. Without material adequacy or "primary goods," there can be no survival or human association or well-being, about which Hume so admirably reminded us.

The principle of justice as harmony is designed to help alleviate the circumstances of injustice in the therapeutic encounter, to which we now return.

HOW PRINCIPLES OF JUSTICE ALLEVIATE INJUSTICES IN THE THERAPEUTIC ENCOUNTER

We may alleviate the conditions of injustice in health care enunciated earlier by applying to them the four principles of justice: (1) justice as harmony; (2) justice as equal consideration of people's needs; (3) justice as regard for material adequacy; and (4) justice as recognition and development of merit.

Too little patient care and the inequitable distribution of health care result in the discriminatory selection of a favored group for treatment and neglect of the remainder. The basis for favored selection, leaving too many people in the outer circle of the untreated and undertreated, is unjust. When discriminatory selection excludes large numbers of patients, that is, when health care distribution is determined by the market conditions of supply and demand, serious questions about the justice of such a health care system arise.

1. Justice conceived of as the harmony of all citizens implies approximately equal consideration of needs and points to the requirement of material adequacy. These, in turn, require ample numbers of well-trained health-profession specialists and researchers, front-line primary-care practitioners, and sufficient supplies and health care facilities. (Primary health care is the initial, first-line contact with a health professional, an example being when one has a common cold or a running nose. Secondary health care involves the diagnosis and treatment of routine sicknesses, such as upper respiratory infections or the flu. Tertiary health care is the complex university-affiliated diagnosis and treatment of serious diseases, such as lung cancer, AIDS, or cardiac arrest.) This conception of a just health care system calls for a nationwide network of primary-care practitioners who treat individuals in their own communities. All patients with non-responsive, nonlimiting diseases (except for AIDS) would be referred to a secondary-level health facility with specialized health professionals and extensive treatment resources (AIDS requires the immediate expertise of tertiary-level physicians). In the

tertiary-level medical centers, there would be a concentration of experts, researchers, and high-level technology resources. All health care resources would be available to everyone, the costs being borne by the entire society. Justice as harmony also provides for a quantitatively and qualitatively sufficient health-education structure that encourages the development of merit needed to ensure ample high-quality health care. (The achievement of such health care goals is not without difficulty, but these are some of the parameters to be considered in reforming the delivery of health care.)

2. The practice of justice in health care means that there must be enough supplies to go around. The application of this principle precludes favorably selecting one group over another as a function of economic forces of supply and demand. The position that favors justice in health care (Daniels, 1988, pp. 66, 91) contradicts Robert Sade's concept of health care as a "purchasable commodity" (Sade, 1988, p. 542). Justice as harmony, as defined, lessens the need for decisions to treat or not to treat based solely on the necessary allocation of health care resources brought about by supply-and-demand market factors. Considerations of justice do not justify avoidable conditions of extreme scarcity for some segments of the population. Excessively high wages or profits to an individual, an institution, or a group of practitioners are ruled out by the concept of justice as harmony. (The meaning of "excessively high wages" is sometimes, but not always, obvious.)

3. The nurse taught to give primary care is one key to the principle of material adequacy. By relieving the shortage of physicians in underserved areas, the nurse practitioner is able to help patients either directly or by referring them to secondary or tertiary health facilities, a distinction cited earlier. Justice as harmony rules against the unfair discriminatory selection of those who receive treatment and those who do not. All patients are cared for at an appropriate level. Patients are not placed in the outer circle of those who are unserved or underserved.

4. Appropriately set up and regulated, a broad spectrum of health care professionals provides for the delivery of health care

services to all citizens. The care extends throughout the life span without regard to socioeconomic status, occupation, residence, or disease (including AIDS, whose incidence is tragically rising into epidemic proportions and which, in the view of some health care administrators, threatens to throw our current health care system into disarray). Moreover, under the conditions of justice as harmony, there is harmony as well within the health profession disciplines. Every individual is educated in accordance with his or her capacities to contribute to the harmony and well-being of all persons. Each person is recognized and appropriately rewarded for merit. Various forms of recognition include trophies and medals, favorable notoriety, news reports, public address announcements, applause, the conferring of degrees to the accompaniment of suitable music, and modest prize money. The emphasis is on bestowing honors and recognition on persons who produce work of merit.

CONCLUSION

Justice in health care consists of promoting the harmony and well-being of all persons. This harmony implies the governing principle of providing approximately equal consideration to everyone's health care needs. Regard for the "needs" principle (which provides for approximately equal distributive shares, meaning "fair" in health care) as primary calls for a third principle: an ample provision of materially adequate health care goods and services. What Rawls refers to as "primary goods" we identify as material adequacy, which includes health care and the education of health professionals. The principle of material adequacy, in turn, depends on a fourth principle: appropriate recognition of merit. The three latter principles (equal consideration of needs, material adequacy, and merit) are necessary conditions of justice as harmony, and they apply both to health consumers and to health providers.

REFERENCES

- Aristotle (1962). *Nicomachean Ethics*. Indianapolis, IN: Bobbs Merrill.
- Bandman, B. (1986). "Option Rights and Subsistence Rights." In E. Bandman and B. Bandman (Eds.), *Bioethics and Human Rights: A Reader for Health Professionals*. Lanham, MD: University Press of America.
- Bandman, E., and Bandman, B. (1986). "Introduction to Rights in and to Health Care." In E. Bandman and B. Bandman (Eds.), *Bioethics and Human Rights: A Reader for Health Professionals*, pp. 258-262. Lanham, MD: University Press of America.
- Bandman, E., and Bandman, B. (1990). *Nursing Ethics through the Life Span*. 2nd ed. East Norwalk, CT: Appleton Lange.
- Benn, S. (1967). "Egalitarianism and Equal Consideration of Interests." In J. Pennock and J. Chapman (Eds.), *Equality*, pp. 61-78. New York: Atherton Press.
- Benn, S., and Peters, R. S. (1957). *The Principles of Political Thought*. New York: Macmillan.
- Copi, I., and Cohen, C. (1990). *An Introduction to Logic*, 8th ed. New York: Macmillan.
- Cranston, M. (1973). *What Are Human Rights?* New York: Taphinger.
- Daniels, N. (1988). *Am I My Parents' Keeper? Justice between the Young and the Old*. New York: Oxford University Press.
- Dewey, J. (1939). *The Theory of Valuation*. In *Encyclopedia of Unified Science*. Chicago: Chicago University Press.
- Feinberg, J. (1973). *Social Philosophy*. Englewood Cliffs, NJ: Prentice-Hall.
- Foot, P. (1978). *Virtues and Vices*. Berkeley: University of California Press.
- Frankena, W. (1961). "The Concept of Social Justice." In R. Brandt (Ed.), *Social Justice*, pp. 3-29. Englewood Cliffs, NJ: Prentice-Hall.
- Griffin, J. (1988). *Well Being: Its Meaning, Measurement and Moral Importance*. Oxford: Clarendon Press.
- Holleran, C. (1976). "Third Party Reimbursement." *Journal New York State Nurses Association*, 7(4).
- Hume, D. (1902). *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*. (L. Selby-Brigge, Ed.) Oxford: Clarendon Press.
- Kant, I. (1950). *Critique of Pure Reason*. Trans. by N. K. Smith. London: Macmillan.
- Kolbenschlager, M. (1975). "At the Indy-500: 300,000 Potential Patients." *The Physician and Sports Medicine*, 3(5), 32-35.

- Kuehn, W. (1979). "Nursing Education Issues Surface at AMA Meeting." *The American Nurse*, 11(7).
- Nozick, R. (1974). *Anarchy, State and Utopia*. New York: Basic Books.
- Outka, G. (1988). "Social Justice and Equal Access to Health Care." In R. Munson (Ed.), *Intervention and Reflection: Basic Issues in Ethics*, pp. 546-554. Belmont, CA: Wadsworth.
- Perelman, C. (1963). *The Idea of Justice and the Problem of Argument*. New York: Humanities.
- Plato. (1974). *The Republic*. Indianapolis, IN: Hackett Publishing.
- Rawls, J. (1971). *A Theory of Justice*. Cambridge: Harvard University Press.
- Sade, R. (1988). "Medical Care as a Right: A Refutation." In R. Munson (Ed.), *Intervention and Reflection: Basic Issues in Medical Ethics*. Belmont, CA: Wadsworth. (For an opposing view, see Daniels, N. (1988). *Am I My Parents' Keeper? Justice between the Young and the Old*. New York: Oxford University Press.)
- Stein, R. (1978). "The Emerging Graduate." In N. Chaska (Ed.), *The Nursing Profession*. New York: McGraw-Hill.

INJUSTICE

Injustice anywhere is a threat to justice everywhere.

MARTIN LUTHER KING, JR. (1929–1968)

The love of justice is, in most men, nothing more than the fear of suffering injustice.

FRANÇOIS, DUC DE LA ROCHEFOUCAULD (1613–1680)

Injustice is relatively easy to bear: what stings is justice.

H. L. MENCKEN (1880–1950)

After all there is but one race—humanity.

GEORGE MOORE (1852–1933)

No man is good enough to govern another man without that other's consent.

ABRAHAM LINCOLN (1809–1865)

Justice is truth in action.

BENJAMIN DISRAELI (1804–1881)

VICTIMS OF GOVERNMENT INJUSTICE

A single death is a tragedy, a million deaths is a statistic.

JOSEPH STALIN (1879–1953)

As I would not be a slave, so I would not be a master. This expresses my idea of democracy.

ABRAHAM LINCOLN (1809–1865)

The next war criminals will come from the chemical and electronics industries.

ALFRED KRUPP (1907–1967), German arms manufacturer
imprisoned for war crimes, 1948–1951

Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary.

REINHOLD NIEBUHR (1892–1971)

Every Communist must grasp the truth: "Political power grows out of the barrel of a gun."

MAO TSE-TUNG (1893–1976)

Victims of Genocide

BURTON M. LEISER, PH.D.

INTRODUCTION

Since the end of the fifteenth century, with the discovery of America by Europeans, genocide has probably been more commonly practiced and more carefully rationalized in both Europe and the Americas than at any other time in history, despite modern pretensions of being civilized, cultured, and "advanced" scientifically, morally, and religiously. With the opening of the New World, genocide became desirable as the only practicable means of usurping territories previously within the domain of other peoples who were reluctant to relinquish them. Advances in the technology of travel, agriculture, and extermination were quickly used to facilitate the process.

Back in Europe, the Holocaust, the scientific and systematic extermination of millions of European Jews, was made possible by these technological advances. But the wholesale butchery of the Jews in Europe was unfortunately not the last incident of genocide. It was the best publicized, possibly also the most grotesquely brutal, and by far the most systematic and widespread incident of its kind in modern times. But other cases of genocide have taken place since the end of World War II.

The physical extermination of entire groups of people is not the only form of genocide. The crime takes other forms as well, not all of them recognized in the United Nations Convention on Genocide. Genocide is defined in the convention as the destruction of an entire people. But an entire people can be destroyed without the physical destruction of every one of its members if its children are deported to other lands or if its cultural heritage is destroyed. Hence, it is possible to commit genocide without employing the methods of mass extermination used by Hitler and his followers.

One of the most insidious forms of genocide consists of the destruction of a people's culture by depriving it of its works of art, its literature, its language, or the land to which it is rooted. By tearing children away from their parents and their communities, compelling them to be raised in a foreign environment where they will be deprived of their own culture and required to assimilate that of their captors, a people may be effectively denied the right to perpetuate itself and to transmit its identity to succeeding generations. During its incursion into Afghanistan between 1979 and 1989, the Soviet Union was accused of following such a policy. In his famous secret speech to the Party Congress in 1956, Nikita Khrushchev made it clear that Joseph Stalin had used methods of physical extermination and cultural genocide in his treatment of numerous minority groups, particularly in the southern (predominantly Muslim) regions of the Soviet Union.

The motives for committing genocide are innumerable, ranging from the mere desire to usurp the lands of others to religious fanaticism; from hunger for gold and other riches to contempt for human beings who have strange or foreign languages and customs.

GENOCIDE AND RELIGION

Just as Jews have been victims of genocide on religious grounds, so have Christian sects. The most flagrant example, perhaps, is the savage persecution of the French Protestants, the

Huguenots, during the sixteenth and seventeenth centuries. In the middle of the sixteenth century, a royal decree imposed the death penalty on anyone who publicly or secretly professed any religion other than the official Roman Catholic faith (Thompson, 1909). Papal edicts required the demolition of any building inhabited by a person who assisted in a private assembly of Protestants. Under the influence of priests and monks who preached that toleration of heretics evinced a compact with Satan, French Catholics hanged, burned, drowned, and otherwise slaughtered some 10,000 Protestants in a period of three months. Pope Pius V rejoiced at the news and urged the king "to pursue and destroy the remnants of the enemy and wholly tear up, not only the roots of an evil so great and which had gathered to itself such strength, but even the very fibers of the roots." He concluded, "Unless they be thoroughly extirpated, they will again sprout and grow up" (Baird, 1895, p. 309). Upon learning that some Huguenot prisoners taken in battle had been spared, the Holy Father wrote to French leaders, warning them against applying the principles of mercy.

At the massacre of St. Bartholomew's Day in 1572, the Spanish ambassador wrote, "As I write, they are killing them all, they are stripping them naked . . . sparing not even children. Blessed be God!" (Acton, 1950, p. 160). The slaughter was no immense that, for months, fish from rivers polluted by decaying human bodies could not be eaten. Wolves emerged from the hills to feed on unburied corpses. The Archbishop of Paris enthusiastically estimated that 100,000 Protestants had been slaughtered, while estimates based on records of the cleanup operations suggest that between 40,000 and 60,000 persons were butchered in Paris and the provinces.

After the king revoked the Edict of Nantes in 1685, which had guaranteed certain rights to Protestants since 1598, all Protestant worship was forbidden (Durant and Durant, 1963). Protestant schools were closed, and Protestant clergy were ordered to leave France within fourteen days. Other Protestants, however, were forbidden to emigrate on pain of being condemned to the galleys for life. All children were required to be baptized by priests and raised as Catholics. Half the property of those who were caught

violating these decrees was offered as a reward to the informers who reported them (Durant and Durant, 1963). The terror that followed is indescribable. Hundreds of thousands converted to Catholicism; others abandoned everything and attempted to escape across the borders into friendly territory. Tens of thousands perished (Durant and Durant, 1963).

There were no racial overtones to these genocidal campaigns. Mass murder as such was not an objective of any of the policies of the French officials or of the popes and clergy who goaded them on. But mass murder was used in order to achieve other objectives: the total extirpation of what was believed to be an alien and heretical religion from the soil of France and then—once that objective had been achieved—its elimination from the face of the earth. The destruction of the Huguenots was only the first step of a grand plan whose ultimate goal was the complete elimination of all forms of Protestantism and of every person who professed any faith other than that of the Church of Rome.

GENOCIDE FOR GOLD AND LAND

The popes and the kings of France were motivated by religious fanaticism. The Spanish *conquistadores* were at least as interested in wealth on this earth as they were in the promise of the Kingdom of Heaven in the world to come. They did not set out deliberately to exterminate the American Indians who fell under their domination. But the policies they adopted had the effect both of annihilating virtually every Indian nation that came into contact with them and of destroying almost every individual Indian who fell within their power. From the Spaniards' point of view, it was usually, but not always, better if more Indians lived than died, as their labor was valuable. But through reckless and cruel policies, through neglect and exploitation, the Spaniards brought about a massive annihilation of the Indians.

By 1500, just a few years after Columbus had first set foot on the island of Hispaniola, the Spaniards had completely subjugated the natives of that island and of all the islands of the Greater

Antilles, including the Virgin Islands. The Spaniards imposed a system of tributes on the Indians, to be fulfilled with gold. The quotas demanded of them, however, were beyond their capacity. Husbands were torn from their wives and families and sent to work in gold mines and mercury mines far from their homes. Those who did not die on the job returned so exhausted, depressed, and sick that they lost interest in sexual relations and the physical capacity to engage in them.

Young mothers, not accustomed to the agricultural labor they were compelled to perform, were overworked and famished. Consequently, they had no milk for their babies, who died in enormous numbers. One eyewitness reported that seven thousand children died in Cuba in a single three-month period. "In this way," he wrote, "husbands died in the mines, wives died at work, and children died from lack of milk, while others had no time or energy for procreation, and in a short time this land which was so great, so powerful and fertile, though so unfortunate, was depopulated" (Las Casas, 1974, pp. 109–112). In eight years, 90 percent of the total population of Hispaniola had perished—and the same fate awaited the populations of the other islands of the Caribbean and the South American continent.

On one island alone, over three million people perished from war, slavery, and work in the mines between 1494 and 1508 (Steward, 1948). Forty years after Columbus had first landed in America, only five hundred natives remained on Hispaniola. The colonists then began to import blacks and Indians from other parts of the Caribbean as replacements for the vanishing labor force. By the time of Sir Francis Drake's visit in 1585, not a single Indian remained alive (Steward, 1948).

Puerto Rico had between 250,000 and 600,000 inhabitants when the Spanish first landed there. Cuba, Jamaica, the Bahamas, and the Virgin Islands were also heavily populated. No descendants of the original Indians remain on any of these islands.

Unfortunately, the Spanish were not alone in their oppression of the peoples of the Americas. The British totally depopulated the islands of St. Kitts, Nevis, St. Lucia, Barbados, Montserrat, and Antigua. The French did the same on Guadeloupe, Martinique,

Desirade, Marie Galante, and Grenada. The Dutch also exterminated all of the Indians who were living on the islands they occupied (Steward, 1948, p. 519).

But none of this can be accounted for simply on the grounds of racism, religious bigotry, or any other bigotry. The explanation is actually quite simple: lust for lucre. The Indians possessed enormous quantities of gold. Once they were stripped of all they had, they were forced into the mines to produce more. Other peaceful Indians were compelled to dive for pearls until not a single member of their tribe remained.

The tragedy of the Incas is well known and need not be recounted in detail. A once-great empire was ruthlessly destroyed, its kings humiliated and murdered, and its people pressed into service as pack animals, who were cruelly disposed of whenever they ceased to be useful. When the proud Incas turned out to be difficult to manage, the Spaniards used fiendish measures to subdue them: burying them alive, impaling them, cutting off their right hands, even slaughtering their women and children. Although these measures were not *intended* to exterminate the population, at least in the subjective sense of that word, they nevertheless had that effect. If, however, we use the legal definition of *intention*—in which a person is said to intend the natural consequences that any rational person would expect his or her actions to bring about—then of course, they *did* intend to exterminate those people. Most of these foreign occupiers could not see that what they were doing was in any respect improper. They had legal and ecclesiastical sanction, from kings and popes and priests back home, for what they were doing. It was all done in the name of the sovereign and of the church that they believed had universal jurisdiction. They therefore perceived the Indians as being convenient pack animals who could be slaughtered as wantonly as if they were recalcitrant burros or mad dogs.

By the 1540s, the population of two provinces in Peru had dwindled from eighty thousand to four thousand, and other areas also lost as many as 95 percent of their people. A contemporary chronicler described a valley that had once had carefully culti-

vated fields as being overgrown with brambles and dense thickets. Everywhere he saw tombs filled with human bones. Irrigation works had fallen into disrepair and were no longer operative. The population was gone (Las Casas, 1974). As the Incas perished by the millions, they ceased to exist as a people—not because the Spanish conquerors had deliberately embarked on a policy of extermination, but because they exploited the Indian labor with reckless disregard for human life. To them, the Indians were a resource to be “harvested” and used for the benefit of the Christians who had come to “civilize” the region, just as hunters today speak of “harvesting” deer and other game animals. The Indians, in short, were mere animate objects.

The native peoples of the United States were also decimated, both deliberately and recklessly, by abuse heaped on them by selfish white men and women determined to take over their lands and the resources contained within them. In response to predictions that the natives would soon vanish forever because of the impact of the whites on them, it was not uncommon to see anonymous statements that the extinction of the native Americans would be no great calamity. One writer (Anonymous, 1823) looked on the conversion of hunting grounds into cornfields and of the forests into “prosperous and civilized villages,” the abodes of “civilized Christian men,” as great boons to civilization. The “barbarous population,” he wrote, “has been replaced by a better, happier one. This,” he concluded, “was no reason for distress” (p. 36).

Moreover, it was argued, it was difficult to see what one might have wanted to preserve. The native Americans’ languages were useless, and they would be better off learning English. Their way of life was not worthy of preservation because their “religious conceptions are notoriously of the grossest and most degrading kind, their traditions mere bloody recollections of prisoners scalped and tomahawked” (Anonymous, 1823, pp. 36–37). The disappearance of the last vestige of whatever it is to be a native American would be no cause for regret by an intelligent Christian (Anonymous, 1823, pp. 36–37).

CONTEMPORARY GENOCIDE

If genocide were a dead relic of the past, it would not be necessary to discuss it except as a historical curiosity, and unhappy reminder of barbarous times that are thankfully long gone, buried under the advances of science, morality, civilization, and the rule of law. Unfortunately, genocide is still very much with us. Despite the unassailable evidence that genocidal actions and policies continue apace in various parts of the world, efforts to bring them to an end are few and feeble. The agencies entrusted with the protection of this most precious human right—the right to survive physically and culturally as individuals, nations, peoples, or religious groups—are silent, doing nothing to bring a halt to the decimation of whole populations and the liquidation of entire peoples. These monstrous crimes receive virtually no attention in the world's press or other media. Only occasional hints creep through the masses of verbiage that make their way into the world's most prestigious journals and news media, and there is seldom any follow-up on the enormous crimes thus revealed. The people affected are too remote, too little known, too "inconsequential," and too powerless to maintain the interest of the media. They therefore suffer and perish in silence.

Cambodia

Between April 1975 and January 1979, during the rule of the Khmer Rouge in Cambodia (Kampuchea), it is estimated that some two to three million people perished. "The abounding evidence is incontrovertible: Cambodia for 44 months was a slaughterhouse. And today it is one big graveyard" (Wein, 1981, p. 24). Prisoners chained to their beds were beaten to death. Some were drowned; others were slaughtered by having their throats cut. In a suburb of Phnom Penh, some 20,000 human beings, including several thousand children, were liquidated at rates as high as 582 per day (Wein, 1981). These numbers pale into insignificance when compared with the death rates at the Nazi death camps of Auschwitz, Bergen-Belsen, and others. But such comparisons are inap-

appropriate: in discussions of human lives, such statistical comparisons are irrelevant and callous.

In a search of another Cambodian site, 129 mass graves were discovered. The first 12 graves yielded over 1,500 bodies, suggesting that some 16,000 persons died in that area alone (Wein, 1981, p. 24; Lewis, 1977, p. 27c).

One must ask what the United Nations did during those years of mass slaughter in Cambodia. Why was the world not apprised of the situation? Why did the Security Council not convene in special session to act on the information that was available? Why were the hundred or more signatories to the United Nations Convention on Genocide silent during those long years?

The Pygmies

In the 1930s, Jean-Pierre Hallet (1973) grew up in Africa among the Efé Pygmies, who then numbered about 35,000 (Hallet and Pelle, 1973). A peaceful people, the Efé Pygmies who lived in the Ituri Forest (in what is now Zaire) are today threatened with extinction. Their ancestral forest is being chopped down for lumber; thus their sources of shelter, food, medications, and clothing are being destroyed. Plantations of Bantu and Sudanese blacks are encroaching upon their lands, and hordes of tourists have introduced lethal diseases into the area. To be sure, these diseases have not been imported into the area deliberately, and certainly not with the avowed purpose of decimating the native population. But that has been the effect. Because similar effects have occurred everywhere, that result should have been anticipated, and probably was; but nothing was done to prevent it from happening.

By 1957, the population of the Efé Pygmies had dropped to 25,000 (Hallet and Pelle, 1973). During the war that ravaged the Congo in 1960, their population dwindled to 15,000. As of 1976, because of harassment by the government of Zaire, only about 3,800 Pygmies had survived, and the loss of their native lands and their cultural decimation proceeded apace. Yet to this day, neither

the United Nations nor any of its constituent bodies has made any effort to save this dying people. Nor have any of the signatories of the UN Genocide Convention attempted to prevail on Zaire to extend some degree of protection to this harmless people. No one has demanded that the lumber removed from the Pygmies' forests be boycotted or that its importation be banned, as some nations have done in order to protect elephants and rhinos. Nor has Zaire made any effort to set aside any of their lands as a preserve for the Pygmy people, as some nations have done in order to preserve their wildlife. As far as the Pygmies are concerned, the Genocide Convention might as well not exist.

The Kurds

In Iraq, the Kurds are a relatively small minority, predominantly of the official Muslim religion, but ethnically distinct from the majority of Iraqis. During the 1960s, the Kurds of Iraq were threatened with extermination by the Iraqi army after years of intermittent warfare. Thousands of Kurds fled to Iran for sanctuary from Saddam Hussein's persecutions in the late 1970s. In response to an amnesty declared by the Iraqi government in the mid-1970s, many of these refugees returned. At least 225 of the returnees were executed. Some 30,000 Kurdish fighters were incarcerated in camps in the southern Iraqi deserts. And 300,000 Kurds, including women and children, were deported to the southern part of the country. Despite calls on the Secretary General of the United Nations to protect the Kurds from Iraq's massive reprisals and deliberate efforts to destroy the Kurds as a distinct ethnic group, the United Nations and its Committee on Racial Discrimination failed to act (Feil, 1976, p. 47; International League for Human Rights, 1976-1977, p. 14). In addition, the Kurdish population in Iraq was decimated by a number of attacks with poison gas launched against civilian population centers by the forces of Saddam Hussein.

In addition to mass murder and deportation, the Kurds have been subjected to intimidation and psychological pressures designed to coerce them into abandoning their distinctive way of life.

The Kurdish language is banned in many schools. All references to Kurds and Kurdistan have been deleted from new editions of schoolbooks. Kurdish newspapers have been closed. Financial awards have been promised to Arabs who marry Kurdish spouses as part of a plan of incentives to destroy the Kurdish people as a distinct group. None of these actions was deemed worthy of attention by the United Nations or individual nations, including the United States, before the outbreak of the war between Iran and Iraq (Kurdistani Democratic Party, n.d.). Once the war began, it was impossible to get reliable information on the fate of this persecuted minority. Since the cease-fire, the United Nations has made no significant effort to ameliorate the plight of this persecuted group. Only more recently, as a result of Iraq's invasion and attempted dismantling of Kuwait, has the world's press paid any attention at all to the plight of the Iraqi Kurds.

Following the 1990–1991 war between Iraq and a coalition of forces under the banner of the United Nations, yet another catastrophe struck Iraq's Kurdish population. Encouraged by the coalition forces under the leadership of the United States, the Kurds rebelled against Saddam Hussein's brutal regime and sought to achieve some degree of hegemony over their territory and autonomy over their own affairs. The abrupt end of Operation Desert Storm, as the war was called, left enough heavy equipment in the hands of Saddam Hussein's forces that they were able to deploy them against the Kurds with devastating impact. Thousands of Kurds were slaughtered, and other thousands perished as they fled to Turkey in the north and Iran in the south to escape the murderous Iraqi armies. Even after they crossed over the international borders or into areas occupied by the victorious coalition forces, their suffering and dying continued in the harsh climate and primitive sanitary conditions that prevailed. At last, after weeks of delay, the UN forces were ordered to provide shelter and protection to the remnants of the Kurdish population. By then, it was too late for countless innocent victims who had perished because of fire from Iraqi forces, hunger, exposure, or disease (Galbraith, 1991; Peretz, 1991).

It is ironic, but neither surprising nor unexpected, that Sad-

dam Hussein embarked on his campaign to exterminate the neighboring Arab state of Kuwait. It is doubly ironic and reminiscent of similar catastrophes that have taken place in other parts of the world that neither the press nor the great powers took heed of the clear signals that were emanating from Baghdad until the invasion was complete; thousands of innocent people had been slaughtered; other thousands had fled, instantly transformed into yet another population of refugees, and massive destruction of a peaceful nation was well under way.

The Hutu of Burundi

In 1972, in the newly established African state of Burundi, the dominant Tutsi (Batutsi) ethnic group went on a genocidal rampage against the Hutu (Bahutu) masses. Truckloads of Hutu—especially teachers, church leaders, nurses, traders, and civil servants, anyone who might be classed as an “intellectual”—were carted away (Lemarchand, 1975). The entire affair seems to have begun with a rebellion by a group of Hutu, who constitute about 85 percent of the country's population, against their Tutsi rulers. The Tutsi, constituting less than 15 percent of the total population, have dominated the country economically and politically for many years. The Tutsi reaction was swift and forceful. By mid-May, Western diplomats and the ambassadors of Zaire and Rwanda concluded that the Burundi government had completed its mop-up of the Hutu rebels and that the killings that continued beyond that time “were part of an effort to eliminate increasing numbers of Hutus” (Melady, 1974, p. 15).

Throughout the country, hundreds of bodies were dumped in mass graves every night (p. 15). The American ambassador, Thomas P. Melady (1974), wrote later that Tutsi leaders were summarily arresting and executing Hutu intellectuals. He reported to the U.S. State Department that “the actions were now approaching selective genocide” and that most diplomats shared that opinion (Melady, 1974, p. 16). The Belgian government de-

clared on May 19, 1972, that the Burundi government's behavior was developing into a "veritable genocide" (Melady, 1974, p. 16).

As many as 200,000 Hutu may have been killed by the end of August 1972; 60,000 Hutu refugees had fled to neighboring countries; and a half million displaced persons were in need of food, clothing, shelter, and medical care (Melady, 1974, p. 31). The Organization for African Unity (OAU) failed to respond to pleas that it intervene; and the United Nations, which had been busily condemning Israel and South Africa, took no action whatever to bring an end to the genocide that was taking place in Burundi. Although the United Nations did manage to send an observer team of five completely ineffective individuals, it maintained its official silence even when vehicles marked "UNICEF" were requisitioned to take Hutu to their deaths (Lemarchand, 1975).

Indians of Latin America

The Amuesha Indians of Peru are regarded by many white Peruvians as beneath contempt (International Working Group for Indigenous Affairs, 1975). Like almost all native peoples that whites have encountered, they are taught to have contempt for themselves and are seen as ungrateful, lazy, vengeful, wild, and drunk. They no longer wear their native garb—togas decorated with bands of bright seeds, beads, and feathers—for they have been "resettled" among white Peruvians, who ridicule any Indians who adhere to the ways of their ancestral people. Their children are not taught their own language, for the parents don't want their children to be punished at the mission schools or subjected to public humiliation if they are overheard speaking their language. Their sacred rites are abandoned, their holy places desecrated. An Amuesha holy man was arrested by Peruvian authorities for allegedly causing a public disturbance merely by attempting to perform a religious ceremony at an ancient shrine near the Plamazú River. The shrine was burned, and some sacred stones were smashed. Now and then a few Amuesha worship there in silence—under cover of darkness, lest they be caught by

the police or by the landowner whose property encompasses their holy place. As one white Peruvian has put it, the only solution for the Indians is for them to be absorbed into the "civilized" culture of the whites. That supposedly can best be accomplished by "colonizing their lands"; for by doing so, "we surround them, and we absorb them, obligating them almost by force, if not by shame, to follow the customs of civilized people" (International Working Group for Indigenous Affairs, 1975, p. 40).

Not long ago, an Amuesha is reported to have said, "When we became civilized, we no longer fought with our bows and arrows. We became friends with the Peruvians. Also when we are civilized and the Peruvians ask us for a piece of land to plant their gardens, we have to give it to them. We are friends now and we have to give them land when they want it" (International Working Group for Indigenous Affairs, 1975, p. 26).

Turning to Venezuela, in 1972 a Christian mission school was built on the upper Orinoco to serve the Yanomami and Yekuana Indians (International Working Group for Indigenous Affairs, 1975). According to those who have visited the school, La Esmeralda, it resembles a prison more than a school. Consequently, no Indian children have come to it voluntarily. In order to recruit students, the missionaries cruised up and down the river in their motorboats, enticing youngsters into the boats with sweets and dry cakes sprinkled with Pepsi Cola. Once the boat was full, it would speed off toward the school, leaving the children's parents to mourn the disappearance of their offspring. Kidnapping in the name of Christianity and for the sake of converting heathens is not the serious crime it would be in most other parts of the world, for it is part of a sacred mission. But it is specifically forbidden by the laws of all states and by the United Nations Genocide Convention—though from the silence of the United Nations and its human rights subsidiaries, one would think that it is no crime at all.

In Brazil, the slaughter of the Indians continues apace. According to Lucien Bodard (1971), who has spent most of his life among the Indians there, some Indians are literally gunned down. Others succumb to the forces of "progress," as whites intrude into their territories. Bodard has reported that many tribes—like the

Arraras of the Rio Gi-Parana, the Aricapus, and the Maxubis—have been almost completely exterminated. Others—like the Muras, the Parecis, and the Bodas Negras—have been “integrated” into civilization by priests and settlers. Such “integration” entails their total destruction as a distinct group. Bodard has produced evidence that those Indians who survive end up as slaves of the Society for the Protection of Indians (SPI). The SPI’s managers become “masters of life and death” in their camps (Bodard, 1971).

On the western side of the Rio das Mortes, the campaign of extermination has continued apace despite the Brazilian government’s own condemnation of the crime of genocide, including:

the liquidation of entire tribes, machine-gunning from the air, epidemics touched off by presents of clothing deliberately infected with germs, gifts of poisoned food, candy containing arsenic given to children, . . . bestial tortures, . . . the survivors being reduced to slavery. (Bodard, 1971, p. 5)

In addition, Bodard (1971) refers to such other practices as the enforced prostitution of Indian women, the theft of Indian territory, and the extraction of promises and contracts by the use of alcohol and force. The Minister of Interior himself dubbed the SPI the “Service for the Prostitution of the Indians” (Bodard, 1971, p. 5).

The Cintas Largas Indians were unfortunate enough to have been living in a Brazilian forest that contained a large stand of lei, a tree prized for its valuable wood. In the 1960s, a Brazilian gentleman name Junqueira, intent on making his fortune from the lumber in their forest, hired a gang of killers to hunt the Cintas Largas down without leaving a single Indian alive. Bombs were dropped on the Indian villages and those who attempted to flee were machine-gunned. An expeditionary force armed with machetes and automatic machine guns then proceeded through the forests on foot to hunt down any survivors. One of the participants in the expedition photographed its leader as he cut a woman in two with an axe. The photo was published in the newspapers.

Some of the Indians, however, managed to escape, found refuge in missions, and told the missionaries what had happened. For the slaughter of two hundred Cintas Largas, the annihilation of the last remnants of a people, there was no punishment in twentieth-century Brazil (Bodard, 1971).

According to Claudio Villas Boas, who has spent his life attempting to save the Indians of the Amazon, those who go into Amazonia for rubber, gold, or diamonds have a slogan that they carry out in practice. "Descar Indios" ("Kill the Indians"). Out of an original population of 3 or 4 million, barely 200,000 to 300,000 Indians remain in the entire nation. "The massacre has gone on for centuries," Bodard (1971) wrote, "and is still going on" (p. 157).

There are hopeful signs in Brazil, however. The 1988 Brazilian Constitution provides for the demarcation of all Indian lands as potential reservations by 1993. Such demarcation will place these potential reservations off-limits to development by outsiders. The Brazilian government under President Fernando Collor de Mello has declared that it hopes to send teams to exchange gifts with isolated groups of Indians, to vaccinate them, and to advise them of the fact that they live in a large country that is dedicated to protecting them (Brooke, 1990, p. E-5). On the other hand, the pressures exerted on the government by miners, loggers, ranchers, and foreign investors for the development of Indian lands are intense. Before the inauguration of President Collor de Mello on March 15, 1990, laws protecting the indigenous peoples were generally ignored, as the government sought to protect the settlers. The settlers, for their part, contend that their problems stem from European-born priests and anthropologists, who are interfering in their affairs and preventing them from continuing the Brazilian tradition of dealing with the Indian problem by assimilating the Indians into the general population (Brooke, 1990).

Nevertheless, the genocide of Brazil's indigenous population continues both directly and indirectly. Intrusions of gold prospectors and foresters into the territories of the Yanomami, in both Brazil and Venezuela, have led to serious clashes between the whites and the Yanomami and to epidemics of lethal diseases and alcoholism among the Indians (Kamm, 1990). The diseases have so

decimated the Yanomami population that there are not enough healthy male adults to provide food for the women and children. The leader of a French medical group that toured the territory early in 1990 reported that the situation was "catastrophic," with malaria, tuberculosis, and malnutrition rampant throughout the population. They estimated that, during the three years before their visit, approximately 15 percent of the Yanomami had perished. The Yanomami situation is made even worse by the serious pollution that mining operations have introduced into the water supplies. Fish are contaminated by mercury leached from ore processing, and airplanes have scared away the animals that the Yanomami formerly hunted. The physical decimation of the Indians is being exacerbated by the swiftness with which their culture is being displaced through their contacts with the white invaders. Government efforts to save the Yanomami have met with stern resistance on the part of the miners, who insist that they, too, have a right to be in that territory (Kamm, 1990, pp. 1, 10).

In Colombia, a group of Cuivas Indians was invited to share a meal with the occupants of the La Rubiela ranch. As the meal was about to be served, the Indians were set upon and slaughtered. At the trial that followed, the settlers frankly admitted that they had killed their guests. In addition, they admitted killing forty other Indians in various raids. "They were acquitted because it was not deemed a crime for them to kill the Cuiva, whom they do not consider to be human beings" (International Working Group for Indigenous Affairs, 1969, p. 9). A new verb has been coined to describe their activities, which continue to this day: *cuivar*, "to hunt Cuiva."

In Paraguay, on May 8, 1974, General Marcial Samaniego, Paraguay's Minister of Defense, called a news conference at which he outlined the five points of the UN Genocide Convention. He then denied that in Paraguay any form of genocide "as defined by the United Nations General Assembly" was taking place (*ABC Color*, 1974, p. 25). He did not deny that large numbers of certain groups of Indians were being killed, that their physical or mental well-being was deteriorating, that they were being subjected to conditions that tended toward their annihilation, or that their

children were being forcibly removed to the care of another people. He merely pointed out that if such crimes were taking place, they did not arise out of an intention to destroy the group as such. "Although there are victims and victimizers," he said, "the third element necessary to establish the crime of genocide, *intent*, does not exist. Therefore, as there is no intent, one cannot speak of genocide" (*ABC Color*, 1974, p. 25).

The Aché Indians of Paraguay have been hunted and persecuted since their first contact with whites several hundred years ago (Melia, 1973). In recent years, these conditions have finally received some publicity in the world press. In 1957, Paraguay's Ministry of the Interior issued a regulation ordering that "under no circumstances can any person murder, kidnap, or enslave Guayaki [the local name for the Aché] of any age or sex under any pretext whatever without being subject to the full force of the law" (Melia, 1973, p. 24). It should be remembered that no law or regulation is ever promulgated to prohibit what nobody is doing.

In December 1970, an Asuncion periodical reported that owners of estates in Sierra del Yvytyruzú were organizing raids against the Aché because "the Guayaki [Aché] are bewitched animals, evil smelling beasts." (*ABC Color*, 1974, p. 27). Bounties were awarded to those who killed Indians. An Aché Indian woman was trapped and murdered, and her skull was displayed in the "hunter's" home. Another hunt ended with the herding of a group of Aché into a corral, where the adults were slaughtered. The surviving children were sold. According to Miguel Chase Sardi, an anthropologist who has worked with the Indians for many years, the Aché are hunted like animals, the adults killed, and the children sold. He has written, "There is no family of which a child has not been murdered" (*ABC Color*, 1970, p. 27). The oversupply of Aché children depressed the market to such a degree that whereas a five-year-old girl could be purchased for the equivalent of five dollars a few years ago, more recently Aché children could be purchased for as little as seventy-five cents (*ABC Color*, 1970, p. 27). When asked about sales of children, the head of the Native Affairs Department has explained that a Japanese

couple who had purchased a child were better able to care for it than were its natural Indian parents; and General Bejarano, president of the Indigenist Association of Paraguay, explains that massacres are "problems" that are "normal in any part of the world" (*La Tribuna*, 1972, p. 15).

Genocidal Threats to the Jews of Israel

After passing its infamous resolution equating Zionism with racism, the General Assembly of the United Nations, and more recently other organs of the UN as well, have devoted an extraordinary amount of time to discrediting the "Zionist entity" and at the same time supporting terrorist organizations whose avowed aim is the destruction of a member state of the United Nations: the State of Israel. The most viciously racist statements can be made at the UN without challenge, as when the Ambassador of Jordan spoke of the Ambassador of Israel:

The representative of the Zionist entity is evidently incapable of concealing his deep-seated hatred toward the Arab world for having broken loose from the notorious exploitation of its natural resources, long held in bondage and plundered by his own people's cabal, which controls and manipulates and exploits the rest of humanity by controlling the money and wealth of the world. (United Nations, 1990)

The very phrase "Zionist entity" reveals the ultimate intention of those who use it. The State of Israel cannot be dignified by being called by its proper name. To refer to it as "Israel" is to acknowledge its existence as a legal entity. Indeed, it cannot even be called the *Zionist state*, as the word *state* suggests legitimacy. Israel can only be called the "Zionist entity," usually without the dignity conferred by capital letters in print, for this implies that it is a *thing* having no particular legal character—an illegitimate, racist thing, an object that can properly be excised, as one might excise a cancerous growth.

Recent United Nations resolutions applying the Fourth Geneva Convention to "Arab territories . . . including Jerusalem" and calling on Israel as the "occupying power" to "abide scrupulously" by the Fourth Convention are especially ominous. Israel, of all the nations on earth, has been accused of employing measures used by the Nazis in Europe during their occupation. Resolution 465, introduced on March 1, 1980, found Israel to be in "flagrant violation" of the Fourth Geneva Convention. Thus Israel became "the first nation in history to be found guilty of behaving as the government of Nazi Germany had behaved" (Moynihan, 1981, pp. 23-31).

The United Nations has tolerated the spewing of anti-Semitic hate; it has adopted resolutions that clearly allude to the allegedly illegal status of Israel, it has welcomed into its midst representatives of interests that make no secret of their intention to destroy by force of arms a member state of the United Nations, indirect contravention of the most fundamental tenets of the UN Charter, and it has ignored or condoned genocidal actions by great and small powers all around the world, from Cambodia to Paraguay from Burundi to Brazil. Such an organization is not fit to be entrusted with the protection and enforcement of the most fundamental human right of all: the right of peoples to survive and of their members to live in peace.

THE GENOCIDE CONVENTION

The failure of the United States to ratify the Genocide Convention while the memory of Auschwitz was still fresh in the minds of all was a national disgrace. The convention, finally ratified by the United States in 1988—forty years after it was sent to the Senate by President Truman and long after most other nations had accepted it—does not include all of the provisions that American negotiators had wanted when it was being written. It does include some, however, that are undesirable. The Senate at last realized that by ratifying the convention, the United States

could join the rest of the civilized world in outlawing one of the most grievous of all human rights abuses and in providing for meaningful sanctions against those who violated the law. The Senate attached to its ratification instrument a number of understandings and reservations that modify the convention to some degree and thus made it more palatable to the United States than it might otherwise have been. The principal changes are the following:

1. In order to establish guilt under the American understanding of the convention, it is necessary to show that the perpetrators committed their acts with the *specific intent* of committing genocide. Thus acts destructive of large numbers of human beings during wartime would not be deemed genocidal unless it could be proved that that was the purpose of the destructive acts (United States Code, 1988, Section 1091(a)).

2. The convention's prohibition against incitement to commit genocide must be understood as being distinguished from mere advocacy, so as to protect the First Amendment right of free speech. It was defined as urging another "to engage in conduct in circumstances under which there is a *substantial likelihood* of *imminently causing* such conduct" (United States Code, 1988, Section 1093(3)).

3. Under the American understanding of the convention, the intent must be to destroy a national, ethnic, racial, or religious group in whole or in *substantial* part. The purpose of adding the word *substantial* was to make it clear that the convention is aimed at actions against large numbers of people. The Senate defined *substantial* as "a large enough number of individuals such that their destruction or loss would cause the destruction of the group as a viable entity" (*Congressional Record*, 1988, pp. 4156–4166).

It is worthy of note that the penalty attached by the United States to the crime of genocide is a fine of not more than \$1 million and life imprisonment for genocidal killings, and a fine of not more than \$1 million and/or imprisonment for not more than twenty years for any other genocidal act, such as causing serious bodily injury to members of the group, causing permanent mental im-

pairment to them through torture or drugs, preventing them from giving birth to children, and forcibly transferring their children to another group (United States Code, Section 1091(b)). Some members of the Senate Judiciary Committee filed an opinion in which they argued for the imposition of the death penalty for the crime of genocide. "Genocide," they said, "is one of the most heinous crimes. As such, it is certainly deserving of the death penalty if perpetrated in the United States. Providing the death penalty as a punishment for genocide underscores the seriousness of such an act and as well provides a sense of balance and proportion in the punishment prescribed for Federal crimes" (*Congressional Record*, 1988, pp. 4156-4166).

Ratification of the Genocide Convention by the United States was neither necessary nor sufficient to outlaw the practices the convention condemns. Genocide was a crime long before the convention was written. Under international law, those who perpetrate such crimes may be brought to justice without reference to the convention—just as the criminals who were tried and convicted at the war crimes trials after World War II were brought to justice on the ground that they had committed war crimes and crimes against humanity, even though such crimes were only loosely defined in treaties that existed at the time. Similarly, let it not be forgotten that the Constitution of the United States makes no pretension of conferring new rights on American citizens. It merely *recognizes* and *guarantees* rights that American citizens claimed even before the Constitution was adopted. Such universally recognized rights need no formal ratification, though every measure that is taken to guarantee them is a welcome addition to the world's armory of weapons—feeble as they are—against human rights abuses.

EPILOGUE

An Ache myth (Melia, 1973) holds that the soul of the deceased, in the form of a demon, pursues that person's enemies in

their dreams. As one captive Aché, weak and ill and tormented by the decimation of his people, put it, "The accursed whites cannot sleep because they are haunted by many demons" (p. 57). He was right. More than a hundred delegations to the United Nations acquiesced in the destruction of the Aché, the Cintas Largas, the Pygmies, the Hutu, the Kurds, and other weak, despised, powerless, and disinherited people of the Earth. They continue to do so. The members of those delegations *should* be haunted by demons of all those suffering human beings:

REFERENCES

- ABC Color* (Asunción, Paraguay, May 9, 1974), cited in IWGIA, Vol. 17.
- ABC Color* (Asunción, Paraguay, December 16–17, 1970), cited in IWGIA, Vol. 17.
- Acton, J. E. (1950). *Lectures on Modern History*. London: Macmillan.
- Anonymous. (1823, January). "On the State of the Indians." *North American Review*.
- Baird, H. M. (1895). *History of the Rise of the Huguenots of France*, Vol. 2. New York: Scribners.
- Bodard, Lucien. (1971). *Green Hell: Massacre of the Brazilian Indians*. (J. Monaghan, trans.). New York: Outerbridge & Dienstfrey.
- Brooke, James. (1990). "Conflicting Pressures Shape the Future of Brazil Indians." *New York Times*, February 25.
- Congressional Record*, Vol. 134 (1988). *Senate Report No. 100-133*.
- Congressional Record*, Senate Judiciary Committee Report, May 11, 1988, U.S. Code Congressional and Administrative News, Vol. 6, 100th Congress, 2nd Session, 1988, pp. 4156–4166.
- Durant, Will, and Durant, Ariel. (1963). *The Age of Louis XIV*. New York: Simon & Schuster.
- Feili, C. Y. (1976). "The Kurdish Struggle for Independence." *Middle East Review*, 9.
- Galbraith, Peter. (1991). "Last Stand. A Report from Kurdistan." *The New Republic*, 204(17), 11–12, April 29.
- Hallet, Jean-Pierre, and Pelle, Alex. (1973). *Pygmy Kitabu*. New York: Random House.

- International League for Human Rights (1976-1977). *Annual Review*, Vol. 14.
- International Working Group for Indigenous Affairs (1969). Document 7
- International Working Group for Indigenous Affairs (1975). Document 16.
- Kamm, I (1990). "Amazon Tragedy: White Man's Malaria and Pollution Imperil Remote Tribe in Brazil." *Wall Street Journal*, March 21, pp A1, A10.
- Kurdistan Democratic Party, (n.d.), International Relations Committee, Report No. 2.
- La Tribuna* (July 2, 1972), cited in IWGIA, Vol. 7
- Las Casas, Bartolome de (1974). *In Defense of the Indians* (S. Poole, trans.) De Kalb: Northern Illinois University Press.
- Lemarchand, René (1975, January-February). "Ethnic Genocide." *Society*, 12(2), 50-60.
- Lewis, Anthony. (1977). "Where Terror is King." *The New York Times* March 21.
- Melady, Thomas P. (1974). *Burundi: The Tragic Years*. New York: Macmillan.
- Melia, B. (1973). *Ratones y Jaguars*. Asunción del Paraguay: Centro de Estudios Antropológicos, Universidad Católica Nuestra Señora de la Asunción.
- Moynihan, Daniel P. (1981, February). "Joining the Jackals: The United States at the United Nations, 1977-1980." *Commentary*, 71(2), 23-31.
- Peretz, Martin. (1991). "Unpromised Lands." *The New Republic*, 204(22), 20-26, June 3.
- Steward, Julian H. (1948). *Handbook of South American Indians: The Circum-Caribbean Tribes*, Vol. 4. Washington, DC: Government Printing Office.
- Thompson, James W. (1909). *The Wars of Religion in France, 1559-1576: The Huguenots, Catherine de Medici and Philip II*. Chicago: University of Chicago Press.
- United Nations. (1990). Speech by the Ambassador of Jordan to the United Nations General Assembly meeting in New York, NY (unpublished).
- United States Code (1988). Title 18, Chapter 50A, Sections 1091-1093.
- Wein, Barry. (1981). "Cambodia: What Remains of the Killing Ground." *Wall Street Journal*, January 29.

Weapons Control Laws

Gateways to Victim Oppression and Genocide

DAVID I. CAPLAN, PH.D., L.L.B.

A SHORT HISTORY OF WEAPONS CONTROL LAWS IN COMMON-LAW JURISPRUDENCE

The Riot of York, England (1189)

Weapons control laws have a long history in Anglo-American jurisprudence. One of the first such documented laws, the Assize of Arms (Statute of England, 1181), contained a stringent weapons control provision directed against all Jews. It forbade any Jew from possessing even a coat of mail or a breastplate. Eight years later, a vicious anti-Semitic mob of rioters attacked the Jews of York, England. The attack precipitated an uneven fight in which Jewish resistance collapsed because the Jews had "few weapons" (Grayzel, 1968, p. 307). As a result, virtually the entire Jewish community of York was annihilated.

The impact of this very early weapons control law demonstrates a dire result to which such laws can lead. The intent and effect of weapons control laws, whether articulated or not, often is to place only certain segments of the community at a disadvan-

tage. In this way, from earliest times weapons control laws have facilitated the oppression and devastation of the disarmed.

The Statute of Northampton (1328)

In 1328, the English Statute of Northampton (Statute of England, 1328) was enacted, flatly prohibiting everyone, except upon the king's order or in concert with the community, from carrying any arms. Concerning this Statute of Northampton, Jean Jules Jusserand wrote, "Manners being violent, the wearing of arms was prohibited, but honest folk alone conformed to the law, thus facilitating matters for the others" (Jusserand, 1896, p. 270). This statement demonstrates another socially undesirable outcome of even well-meaning weapons control laws: more frequently than not, such laws are obeyed only by persons who are law-abiding.

ANGLO-AMERICAN CONSTITUTIONAL APPROACH TO THE RIGHT TO KEEP ARMS

The Glorious Revolution of 1688

Among the causes of England's Glorious Revolution of 1688 was a royal proclamation by James II ordering that the militia should "cause strict search to be made for . . . muskets or other guns and to seize and safely keep them" (Calendar of State Papers, 1686). Although this proclamation was not on its face directed against Protestants, James II, being a Catholic, enforced this disarmament proclamation selectively against only Protestants. He also quartered troops in the private homes of Protestants (Oregon Supreme Court, 1980).

Firearms control laws nondiscriminatory on their face thus often provide temptation for politically motivated and discriminatory enforcement. Even though weapons control laws may be worded to apply universally, in practice they have been enforced to victimize disfavored segments of the population.

English Bill of Rights of 1689

At the end of the Glorious Revolution, James II fled to France, and a Parliament was elected which enacted the English Bill of Rights of 1689. Chief among its provisions was a guarantee of the right of Protestants to "have arms for their defense, suitable to their conditions and as allowed by law" (Oregon Supreme Court, 1980, p. 364). It is of great importance to note that, when the English Bill of Rights was being debated in Parliament, attempts were made to limit the right of individuals to possess arms strictly for the purpose of "their common defense" (*House of Commons Journal*, 1689). These attempts were soundly defeated. Thus, to prevent victimization of individuals, an individual right, as opposed to a collective right, to possess arms was clearly intended.

American Revolution of 1776

Although not frequently noted, the imposition by General Gage, the British military Governor of Massachusetts, of an arms confiscation scheme on the colonists in Boston, played an important role in igniting the American Revolution. As a condition for leaving Boston, the inhabitants of Boston were required to deliver up their arms, with the stipulation that these arms would be returned to them when they returned to Boston. However, the arms were not returned when their owners came back to Boston. Note that General Gage's arms confiscation program included the seizure of privately owned firearms kept at home.

Ultimately, the American Revolution resulted in the adoption in 1789 of the United States Constitution, followed in 1791 by its Bill of Rights. The Second Amendment in the Bill of Rights provides:

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

It is frequently debated whether an individual right was intended by the Second Amendment. The legislative history of the amendment is crucial to deciding this question. As in the debates a hundred years earlier in the English Parliament, the First Congress of the United States decided conclusively that an individual right was intended. In 1789 an attempt was made on the floor of congress to dilute the right to keep arms by adding the qualifying words "for the common defense" (Schwartz, 1971, p. 1153). This attempt was roundly defeated.

ANGLO-AMERICAN RIGHT OF VICTIMS TO USE ARMS

Right to Use Deadly Force in Defense against Heinous Felonious Attacks

Inherent in the right to have arms for security is the right to use those arms in self-defense and with deadly force to repel, resist, or suppress violent and heinous crimes such as cold-blooded murder, robbery, arson, forcible rape, housebreaking, or mayhem (Perkins and Boyce, 1982). When a victim resists any of these heinous felonies, at common law the victim has the right—if not the duty (Bishop, 1923)—to use deadly force to the point of killing the criminal assailant, without demonstrating actual need for using the deadly force: the need is presumed. The traditional rationale for this approach is that the resisting victim is regarded as protecting not only himself or herself but also the next victims, and that his or her life is presumably in peril during the attack. Such resisting victims were thus regarded as "protecting the public order" (Perkins and Boyce, 1982, p. 1108), that is, protecting both themselves and countless future victims. Such victims also had the duty, using deadly force if necessary, to arrest the felon to prevent his or her escape in immediate flight from the scene of the crime, but not later on (Bishop, 1923).

On the other hand, crimes escalating from mere quarrels or mutual combat, such as homicides occurring during barroom

brawls and other fights, were regarded as being in an entirely different category. They are not included here. The rules concerning the use of deadly force in such situations were much more circumscribed and limiting, on the theory that both participants had acted wrongfully in instigating the situation or allowing it to escalate and that neither was protecting the public, whereas in cases of resistance against heinous felonies no wrongful activity on the part of the victim could be presumed (Bacon, 1630) and the resisting victim was viewed as protecting the "public order."

The New Rules and Their Harmful Effects on Victims

During this century, in many states, new statutes and court decisions abolished the common law rules and allow the victims of heinous felonious attacks to use deadly force if and only if such force "reasonably seem[s] necessary to prevent the commission" of the felony (Perkins and Boyce, 1982, pp. 1111). Thus the law-abiding victim of a dangerous felonious attack has been placed at a severe tactical disadvantage. The use of force by the defending victim, too much or too soon, sends him or her to prison; too little or too late, to the cemetery.

In 1962 the American Law Institute, an unofficial group of jurists and law professors, promulgated its Model Penal Code. Some dozen or so states have adopted this code, either by statute or by court decision. The Model Penal Code goes further than the newer statutes and decisions discussed in the preceding paragraph and forbids the victims of a heinous felonious attack from using deadly force in all cases, the only exception arising when the victim has good reason to believe that "there is a substantial risk that the [felonious attacker] will cause death or serious [bodily] harm unless the crime is prevented" (Perkins and Boyce, 1982, pp. 1111-1112).

A robbery victim carrying money would be privileged, under the rules established before the Model Penal Code, to use deadly force against the robbers if the victim reasonably believed such force to be necessary to prevent the success of the robbery. The

victim could use such force "even if the robbers, by superior strength and numbers, would be able to take the money without causing any serious injury to him and assured him that they would not hurt him in any way" (Perkins and Boyce, 1982, p. 1112). Victims would not have this privilege under the Model Penal Code but would have to allow the robbers to take their property.

Restrictive deadly force rules require an innocent victim to rely on the criminals' body-language assurances that his or her life is not in peril. These rules also criminalize self-defense and the defense of the public order. Worst of all, they artificially and by legalistic sleight-of-hand transform innocent victims into criminals and criminals into so-called victims.

Restrictive Firearms Licensing and the Transformation of Crime Victims into "Criminals"

The headlines of two recent newspaper stories tell it all about restrictive firearms licensing: "A Bronx livery-cab driver was arrested on charges of carrying an unlicensed gun after he shot at a man who robbed him, the police said yesterday" (*New York Times*, 1990a); "Man Kills Robber, Murder Is Charged" (*New York Times*, 1990c). Moreover, restrictive deadly-force and gun-control laws unfairly impose Marquis of Queensberry rules on the victims of heinous felonies, while signaling to aggressive perpetrators the strategies and tactics that can be used to take unfair advantage of their legally restricted victims.

Right to Use Deadly Force to Arrest Fleeing Felons

After a heinous felonious attack—such as attempted cold-blooded murder, arson, robbery, burglary, forcible rape, or mayhem—has abated and the victim is completely out of danger, what level of force may be used to apprehend the criminal? Today, in most states, it is perfectly lawful for a private person, a victim or bystander, to use deadly force to apprehend the felon on the spot or to prevent the escape of the fleeing felon if, but only if, this

degree of force is necessary for the purpose (Dressler, 1987). The traditional societal justification for this rule of law is that a heinous felon at large poses an immediate and dangerous threat to the entire community, and that therefore the safety and security of society require the speedy arrest and imprisonment of a felon. Police simply cannot be expected to be on the spot to make an arrest at the commission of every dangerous crime.

The Model Penal Code, however, prohibits a private person from using deadly force to arrest or prevent the escape of a fleeing felon, unless *both* (1) the felony included the use or threatened use of deadly force, *and* (2) the person effecting the arrest is "assisting" one who is "authorized to act as a peace officer." Thus, under the Model Penal Code, a fleeing armed robber, burglar, or rapist would be legally immune from being apprehended with deadly force by his victims. For example, the code would prevent the victims from using such force even if they had just been shot by the criminal and were bleeding to death, unless they were "assisting" a "peace officer" who happened to be there.

UTILITY OF PRIVATE FIREARMS POSSESSION TO PREVENT VICTIMIZATION

Criminologists (Kleck, 1988; Lizotte, 1986) have shown that over one-half million Americans use firearms annually—most often without firing a single shot—in defense against violent criminals. They also found that using a firearm for protection, especially in the home, where the victim is more likely to have the advantage of familiarity with the environment, reduces the likelihood that a crime will be completed by the criminal. It also reduces the likelihood of injury to the victim. Moreover, burglars seek to avoid areas where firearms are kept by many, though not necessarily all, houses (Kleck, 1988). Thus the anonymous keeping of home-defense arms by many householders protects the entire community.

Vigilantism versus Legitimate Defense of Self and of Public Order

Vigilantism occurs when a person who makes an arrest or captures a heinous felon does not immediately deliver the captured miscreant to the proper authorities. A vigilante might instead deliver the captured individual to a vigilance committee, which might conduct a mock trial and or execution (Friedman, 1985). By contrast, the availability of a lawful manner for an ordinary person to arrest a wrongdoer on the spot provides an important socially approved escape valve for the law-abiding victim when confronted by a criminal when the police are not available to make an immediate arrest. Under the novel restrictive rules, it is not difficult to understand the temptation of a crime victim to administer rough justice on the spot and simply to disappear, a type of event that is becoming repetitive in New York City, for example (*New York Post*, 1990).

Deadly Force to Suppress Civil Disorders

The common law of England (Hawkins, 1788) and America (Wharton, 1932)—until abolished by statute in England in 1967 and by various states in America during this century—allowed, if not commanded, private citizens to use deadly force *if necessary* to suppress or disperse a dangerous or destructive riot. Even the Model Penal Code would allow deadly force to be used by riot victims on the theory that, during a riot or civil disturbance, there is always a danger that the police “may be overwhelmed and rendered impotent by the sheer weight of numbers” (American Law Institute, 1985, p. 135). Such overtaxing of police resources occurred during the 1967 Newark, New Jersey, riot where there were 62 major fires, and 1,029 business establishments and 29 residences were damaged (*New Jersey Superior Court Reports*, 1969).

During an April 1968 riot in New York City, a shopkeeper heeded a warning by police not to protect his business establishment with his own firearm (*New York Law Journal*, 1975). His shop

was looted and damaged. On his suing the city, the trial judge overturned a previous jury verdict in his favor. The judge opined that, because the police had been overextended during the "widespread crisis" occasioned by the riot, police protection of one person's premises "might have resulted in a neglect of the public at large." The judge added that, in such a crisis, the concept of reasonableness demanded that the allocation of police resources be left "to the discretion of the police department." The court concluded, "It is this concept of reasonableness which excuses a municipality from liability when in the exercise of high administrative judgment the overriding interest of the public requires that rioting be permitted" (*New York Law Journal*, 1975, p. 6).

Aside from the foregoing ruling, even if the police had attempted in good faith to respond quickly, there is no guarantee that they would have or could have arrived in time to prevent the looting and burning of a shop or residence. By contrast, right after a July 1977 New York City blackout riot, a shopkeeper explained why his store had been neither looted nor damaged as many others had been: "This store is okay because I stayed here all night with my .32 caliber pistol and my attack dog" (*New York Times*, 1977).

The aftermath of Hurricane Hugo in the Virgin Islands in September 1989 furnishes another example of the futility of victims' reliance for their safety and well-being on the constituted authorities during riots or other widespread disorders. After Hurricane Hugo had wreaked its havoc on St. Croix, widespread looting followed (*USA Today*, 1989). At first the police attempted to stop the looting by shooting in the air. When that failed, they joined in the looting. National Guardsmen were then called in to restore law and order, but they likewise joined in the looting "while gangs were moving through the streets with rifles" (*New York Times*, 1989).

There are thus times when the victims of crime have no alternative but to rely on their own resources and devices. During civil disturbances in which victims are faced with hordes of criminals descending on their persons and property, threatening

their lives, homes, and businesses, firearms with large-capacity magazines—so-called assault weapons—would seem to be the only practical and realistic option for the potential victims to hold mobs at bay.

POLITICAL OPPRESSION AND GENOCIDE, AND WEAPONS CONTROL LAWS

"Prompt defensive measures are the most effective means for the prevention of genocide," observed V. V. Stanciu (1968, p. 187), Secretary of the International Society for the Prevention of Genocide, Paris, France. Mr. Stanciu unequivocally proclaimed, "The most moral violence is that used in self defense, the most sacred juridical institution" (p. 187). He clearly appreciated and perceived the keeping and using of arms by potential victims as a most effective means for preventing genocide.

Weapons Control Laws and Oppression of the Masses

Historically, weapons control laws have been used to oppress the bulk of the population. For example, the kingdoms of Europe kept the masses under their domination by prohibiting them from keeping arms (Madison, 1788). One of the goals of the English Game Act of 1671 (Statute of England, 1671)—which prohibited any person who was below the rank of esquire or who did not have an annual income of at least 100 pounds from keeping any gun—was "prevention of popular insurrections and resistance to [oppressive] government, by disarming the bulk of the people" (Blackstone, 1766, p. 411).

Disarmament and Oppression of Blacks in the South

Immediately after the Civil War in the United States, in the southern states the slave codes reappeared as the Black codes (Coulter, 1947; Du Bois, 1935). These codes restricted the access of

African-Americans to firearms, typically by means of restrictive licensing provisions (Laws of Mississippi, 1865). In this way, the white establishment in the South was able to continue to oppress African-Americans, as by using the white militia to "hang some freedman or search negro houses for arms" (Trumbull, 1866, p. 474).

Disarmament and Oppression of the Sioux Indians

In 1876, the U.S. Army took from the on-reservation Sioux Indians their weapons and horses (*Sioux Nation of Indians v. United States*, 1979, p. 1166). Consequently, when in 1877 Congress passed a statute offering the Sioux food rations and a very low cash payment in exchange for their favorite lands, known as Black Hills, the Sioux were faced with the "Hobson's choice of ceding the Black Hills or starving. Not surprisingly, the Sioux chiefs and head men chose the former rather than the latter" (*Sioux Nation of Indians v. United States*, 1979, p. 1167).

Disarmament and Massacre of Jews in Morocco (1912)

In 1912, the French military invaded Fez, Morocco. In order to consolidate their grip over the native population, the French ordered the entire community to turn in their firearms. The native Arabs did not comply, but the Jews turned in their weapons. Taking advantage of this arms imbalance, the Arabs proceeded to act out long-standing feuds and massacred the disarmed Moroccan Jewish community (Videotape at Museum of the Diaspora, Israel, undated).

Weapons Registration Laws and Genocide in the Ukraine (1932–1933)

In 1926, the Soviets imposed strict arms registrations on the Ukrainians (Conquest, 1986). These registrations furnished convenient lists of all Ukrainian-held firearms and their owners. Just

before the Harvest of Sorrow famine in the Ukraine in 1932–1933 the Soviets, greatly facilitated by the registration lists, confiscated all civilian-owned firearms. The disarmed population was then rendered helpless and unable to defend itself from Stalin's forced collectivization. This collectivization included not only forced reorganization of Ukrainian farms but also Soviet confiscation of Ukrainian food supplies from private homes, as well as huge deportations of people and "mass execution of innocents" (Gray, 1990, p. 3).

Weapons Registration Laws in Nazi Europe

When the Nazis invaded various countries of Europe, they forced countries, like Denmark, that did not have gun registration laws to enact them (Kessler, 1983). The Nazis then proceeded to issue proclamations in the occupied countries ordering the submission of all privately held firearms to the authorities, and they carried out searches to enforce these proclamations. The registration lists were used to facilitate the firearms confiscation process: the authorities knew who had registered firearms, and the registered firearms owners knew that the authorities knew it, and therefore they were the targets of the confiscation process and had better hand over their firearms voluntarily.

Strict Gun Control and Soviet Dissidents

In the Soviet Union, the acquisition and possession of firearms are subject to severe restrictions and limitations (Kessler, 1983). Private handgun ownership is banned for most of the population. Soviet dissidents have often been subjected to harassment and assaults by vigilante groups, which the government acquiesced in or even encouraged. The Soviet police did nothing to stop the victimization of the dissidents by the vigilantes. If the dissidents armed themselves for protection against the violence, they were arrested for violating the gun laws; if they did not arm, they were hapless victims awaiting serious injury or death.

Recent Use of Weapons Registration Laws in the Soviet Union

In 1989, firearms registration lists were used by Soviet police to confiscate hunting rifles in the Republic of Georgia, those firearms being the only kind that previously could be legally possessed (*Atlanta Journal and Constitution*, 1989; *Wall Street Journal*, 1989). Similarly, in March 1990, the Soviet government ordered all Lithuanians to turn in their hunting rifles (*Washington Post*, 1990), registration lists again acting as a strong inducement for Lithuanians to comply (*Washington Times*, 1990).

DANGERS OF FIREARMS-PURCHASE WAITING PERIODS AND OF FIREARMS LICENSING LAWS

Laws requiring a waiting period from the time a person purchases a firearm until the time he or she is allowed to take possession of it pose dangers separate from and similar to those posed by licensing or registration lists. A waiting period can impede or delay the acquisition of arms by an entire community when it needs them most. A stark example of sudden peril to an entire community is furnished by the autumn back-to-school serial murderer of college students at the University of Florida at Gainesville, where the three-day Florida firearms-purchase waiting period impaired the ability of the students to take precautions (*USA Today*, 1990) or defend themselves. Likewise, an individual may be threatened with immediate deadly retaliation for having obstructed organized or unorganized crime, such as drug trafficking, as by having organized his or her neighbors into an anticrime watch.

There is another serious danger in waiting-period legislation. Waiting periods are claimed to be necessary to give the police sufficient time to check the eligibility of each prospective firearm purchaser from the standpoint of satisfactory criminal and mental record. Retention of the records compiled by this procedure will

produce, in effect, a registration list of all persons owning firearms. Even though a waiting-period law may contain a provision requiring the police to destroy the records of all checks, the police are not known for their scrupulous adherence to such destruction-of-records requirements. For example, police in New York City have ignored requirements that records of participants in political demonstrations be destroyed (*Handschu v. Special Services Division*, 1985).

VALUE OF UNREGISTERED SMALL ARMS TO DETER TYRANNY BY A GOVERNMENT EQUIPPED WITH MODERN SOPHISTICATED WEAPONS

Partisan Resistance against the Nazis

Heroic partisan guerilla movements all over Nazi-occupied Europe used pistols, shotguns, bolt-action rifles, and hand-carried submachine guns against the German war machine's sophisticated weaponry, which included tanks and warplanes. That these movements could not be vanquished by the modern mechanized Nazi war machine was in no small part attributable to the fact that the partisan resisters' firearms, not being legally "listed" with any government agency but having been illegally obtained by air drops from the allied governments, could not easily be confiscated.

Undoubtedly less well known than the partisan movements are the stories of people like Marion Pritchard, a non-Jewish student of social work who, during the Nazi occupation of the Netherlands, found hiding places for Jews, obtaining for them false identity papers, food, clothing, ration cards, and medical care (*New York Times*, 1990b). One day, a Dutch Nazi policeman surprised her as she was releasing several children from a hiding place beneath the floorboards of a country house near Amsterdam. With a "small revolver" that a friend had given her, but that she had never planned to use, she shot the Nazi policeman.

The Lessons of South Vietnam and Northern Ireland

The sophisticated weaponry of the United States did not enable its forces to prevail over the conventionally small-armed guerilla fighters of North Vietnam. For one reason or another, the United States would not use nuclear weapons in Vietnam. For similar, if not more cogent, reasons, the federal government would not go nuclear against pockets of small-armed resistance in New York City or Indiana farmlands. To this day, the sophisticated weaponry possessed by Great Britain has proved "almost totally beside the point" (Levinson, 1989, p. 657), in its attempt to put down the rebels in Northern Ireland. Therefore, it is "simply silly" to argue that "small arms are irrelevant against nuclear-armed states" (p. 657).

The decision by a government to use military force of a certain level, or military force at all, against its own people is not determined solely by whether the contemplated benefits can be successfully obtained by using such force; rather, it is determined by the attendant cost-benefit ratio (Lund, 1987). Thus, at Tiananmen Square, because a military operation would be faced with little, if any, armed opposition—and hence there was little expected cost in lives or materiel—it was easy and natural for the Chinese government to decide to use military force against the unarmed students. Had the Chinese students possessed AK-47 assault rifles, for example, the decision to use military force might well have been different (Levinson, 1989), and some sort of serious negotiations for an accommodation might well have been achieved.

Likewise, the question arises whether the Holocaust would or could have occurred if Europe's Jews had owned thousands of then-modern military Mauser bolt-action rifles (Levinson, 1989).

These cost-benefit ratio considerations may also explain why "governments bent on the oppression of their people almost always disarm the civilian population before undertaking more drastically oppressive measures" (Lund, 1987, p. 115). Conversely, armed civilians serve as a potent deterrent against drastically

oppressive measures, such as a unilateral governmental edict that the election booths be closed.

The Warsaw Ghetto Uprising

When the Jews in the Warsaw ghetto in 1942 finally realized that meek submission to the slaughter did not lessen the Holocaust but increased it, they decided on a plan of armed resistance. In January 1943, the first armed resistance by the Jewish resisters was carried out with only "ten pistols" (Borzykowski, 1976, p. 29). Nevertheless, the shock of encountering even this relatively small resistance forced the German war machine to retreat and "discontinue their work in order to make more thorough preparations" (p. 72). For three months thereafter, the Nazi German soldiers did not dare to venture into the ghetto. During that three-month period, the Nazis decided that they would have to burn down the ghetto house by house in order to conquer it (Suhl, 1967). The Nazis then proceeded to do so, though not without considerable difficulty and casualties in the face of the armed Jewish resistance fighters.

Had the Germans known from the beginning that the Jewish resistance fighters initially had only those ten pistols—some of them probably so-called Saturday night specials—the Nazis would almost certainly "have continued the raids, [and] Jewish resistance would have been nipped in the bud as a minor, insignificant episode" (Borzykowski, 1976, p. 72).

The Warsaw ghetto uprising thus illustrates serious flaws and dangers in firearms registration or licensing laws. Especially in the present age of computerization, any lists or records of arms registration or licensing create an almost irresistible temptation for governmental bureaucrats to use these lists later on to confiscate the listed arms when perceived exigencies of government allegedly justify such an action. Armed with registration lists or waiting-period lists, rogue bureaucrats or agents of government run amok can disarm their citizens quickly and thoroughly. Disfavored segments of the population can then be more easily oppressed or subjected to genocide.

CONCLUSION

It is obvious that a government engaged in illegal seizures of power or in the political oppression of its citizens or in genocide would certainly hesitate to provoke armed guerilla insurrections or impose house-by-house fighting or burning on its own territory. However, using weapons registration lists to make house-by-house searches for, and confiscation of, weapons in the name of "public safety" can be made politically palatable. Such a confiscation program is, to be sure, a safe course of action for government to pursue; but it is also a course that results in a situation in which, as experience has shown, government officialdom may well be tempted to oppress its thus disarmed citizens. Therein lies the danger of weapons control or registration laws.

When government imposes restrictive deadly force rules on householders or when government outlaws the private possession in the house of the effective means of repelling or resisting criminal and wanton intrusions into people's homes—that is, when it outlaws the private possession of unregistered firearms—then it swings wide open the gates to victim degradation, oppression, and genocide.

NOTES

1. A display of the types of pistols used by the Jewish Resistance Fighters in the Warsaw Ghetto may be seen at the Kibbutz Lochaimei HaGhettaoth (Ghetto Fighters' House) Museum in Israel, as well as at Yad Vashem, Jerusalem. Some of these arms are obviously Saturday night specials within the meaning of former U.S. Senator Birch Bayh's Bill S. 2517 in 1972, which would ban the importation of these handguns and which passed the Senate but not the House.

REFERENCES

- American Law Institute (1962). *Model Penal Code*, Chapter 3. Philadelphia: Author.

- American Law Institute (1985). *Model Penal Code and Commentaries*, Section 3.07. Philadelphia: Author.
- Atlanta Journal and Constitution*. (1989) May 21, p. A-42
- Bacon, F. (1630). *Elements of the Common Lawes of England*, Regula 5. London: I. More.
- Bishop, J. P. (1923). *Bishop on Criminal Law* (9th ed.), Vol. 2, Section 648. Chicago: T. H. Flood.
- Blackstone, W. (1766). *Commentaries on the Laws of England*, Vol. 2, Chapter 27. Oxford: Clarendon Press.
- Borzykowski, T. (1976). *Between Bombing Walls*. Israel Ghetto Fighters' House.
- Calendar of State Papers (1686). December 6. *Domestic Series, James II.* 2, 314.
- Conquest, R. (1986). *Harvest of Sorrows*. New York: Oxford University Press.
- Coulter, E. (1947). *The South during Reconstruction*. Baton Rouge: Louisiana State University Press.
- Dressler, J. (1987). *Understanding Criminal Law*, Section 21.03[B]. New York: Matthew Bender.
- Du Bois, W. E. B. (1935). *Black Reconstruction in America*. New York: S. A. Russell.
- Friedman, I. M. (1985). *A History of American Law* (2nd ed.). New York: Simon & Schuster.
- Gray, E. P. (1990). "The Journalist and the Dictator." *The New York Times Book Review*, June 24, Section 7, p. 3, reviewing S. J. Taylor *Sufism's Apologist: Walter Durranty*. *The New York Times*. *Man in Mosque*. New York: The New York Times Co.
- Grayzel, S. (1968). *History of the Jews*. New York: New American Library.
- Handschu v. Special Services Division*. (1985). *Federal Reporter*, Second series Vol. 787, pp. 828-834. St. Paul, MN: West Publishing.
- Hawkins, W. (1788). *A Treatise of the Pleas of the Crown* (6th ed.). Chapter 28, Sections 14, 23. Dublin: Elizabeth Lynch.
- House of Commons Journal*. (1689). February 11, Vol. 10, pp. 25-26.
- Jusserand, J. J. (1896). *A Literary History of the English People*. New York: Putnam's.
- Kessler, R. G. (1983). "Gun Control and Political Power." *Law and Policy Quarterly*, 5, 381-400.
- Kleck, G. (1988). "Crime Control through the Private Use of Armed Force." *Social Problems*, 35, 1-21.

- Laws of Mississippi. (1865). Printed in W. Fleming, *Documentary History of Reconstruction*, Vol. 1, pp. 289–290. Cleveland: A. H. Clark.
- Levinson, S. (1989). "The Embarrassing Second Amendment." *The Yale Law Journal*, 9, 637–659.
- Lizotte, A. J. (1986). "Determination of Completing Rape and Assault." *Journal of Quantitative Criminology*, 2, 203–217.
- Lund, N. (1987). "The Second Amendment, Political Liberty, and the Right to Self-Protection." *Alabama Law Review*, 39, 103–130.
- Madison, J. (1788). *The Federalist*, No. 46. Reprinted in *The Federalist Papers*. New York: New American Library, Mentor Books, 1961.
- New Jersey Superior Court Reports*. (1969). *A & B Auto Stores of Jones St., Inc. v. City of Newark*, 106, 491–514. St. Paul: West Publishing.
- New York Law Journal*. (1975). *Bloom v. City of New York*, September 5, 174 (No. 47), 6. New York: New York Law Publishing.
- New York Post*. (1990). " 'Death Wish' Shooter Blasts Thug." June 20, p. 7.
- New York Times*. (1977). "A Game of Cat and Mouse on Tour of East Harlem." July 15, p. A1.
- New York Times*. (1989). "Bush Dispatches Troops to Island in Storm's Wake." September 21, p. A1.
- New York Times*. (1990a). "Livery-Cab Driver in Bronx is Arrested on Gun Charges." May 1, p. B2.
- New York Times*. (1990b). "For the Young, a Lesson in the Acts of the 'Righteous Gentiles' who Defied the Holocaust." May 12, p. 11.
- New York Times*. (1990c). "Man Kills Robber; Murder is Charged." July 22, Metropolitan Section, p. 25.
- Oregon Supreme Court. (1980). *State of Oregon v. Kessler*, *Oregon Reports*, 289, 359–372. Salem: State Printing.
- Perkins, R. M., and Boyce, R. N. (1982). *Criminal Law* (3rd ed.), Chapter 10, Section 3. Mineola, NY: Foundation Press.
- Schwartz, B. (1971). *The Bill of Rights: A Documentary History*, Vol. 2, pp. 1153–1154. New York: Chelsea House (McGraw-Hill).
- Sioux Nation of Indians v. United States*. (1979). *Federal Reporter, Second Series*, 601, 1157–1184. St. Paul: West Publishing.
- Stanciu, V. V. (1968). "Reflections on the Congress for the Prevention of Genocide." *Yad Vashem Studies on the European Jewish Catastrophe*, Vol. 7, p. 185. Jerusalem: Post Press.
- Statute of England. (1181). *Assize of Arms*, Article 3. Printed in W. Stubbs, *Select Charters and Other Illustrations of English Constitutional History* (8th ed.). Oxford: Clarendon Press, 1900.

- Statute of England. (1671) 22 and 23 Charles II, Chapter 25. Printed in *The Statutes at Large*, Vol. 3, pp. 349-350. London: Charles Eyre & Andrew Strahan, 1786.
- Statute of England. (1328) 2 Edward III, Chapter 3. Printed in *The Statutes at Large*, Vol. 1, p. 197. London: Charles Eyre & Andrew Strahan, 1786.
- Suhl, Y. (1967). *They Fought Back: The Story of the Jewish Resistance in Nazi Europe*. New York: Crown.
- Trumbull, L. (1866). *Congressional Globe*, 39th Congress, 1st Session, Part 1, p. 474. Washington, DC: Globe Office for E & J. Rives.
- United States Constitution, Amendment II (1791). *The Constitution of the United States*. Reprinted by Commission on the Bicentennial of the United States Constitution. Washington, DC: Government Printing Office, 1989.
- USA Today*. (1989). "Looting Spree: 'There's no Law and Order'" September 21, p. 5A.
- USA Today*. (1990). "Spectre of New Bundy Stalks Fearful Florida." August 31-September 3, p. 3A.
- Videotape at Museum of the Diaspora, Israel. (undated). Tel Aviv: Israel.
- Wall Street Journal*. (1989). "Soviet Police Arrested Hundreds of People in The Republic of Georgia." April 12, p. 1.
- Washington Post*. (1990). "Lithuanians Ordered to Surrender Arms. Gorbachev Asserts Power of New Office." March 22, p. A1.
- Washington Times*. (1990). "Arts, Arms and Stonewalling, Farewell to Arms." March 23, p. F2.
- Wharton, F. (1932). *Wharton's Criminal Law*, 2. Section 1878. Rochester, NY: The Lawyers Co-operative Publishing Co.

Behind Barbed Wire

The Wartime Incarceration of the Japanese-Americans

MICHIO KAKU, PH.D.

TREATMENT OF WEST COAST JAPANESE-AMERICANS FROM PEARL HARBOR TO THE END OF WORLD WAR II

Immediately after Pearl Harbor, when deep emotional feelings and passions were aroused by the expansionist policies of the Japanese war machine, an unprecedented media campaign arose that portrayed Japanese-Americans—most of them hard-working, loyal second-generation Americans—as a group of traitors and a fifth column. Present-day polite lectures and learned debates about the current power of the news media to influence public perceptions and opinion cannot capture the true hysteria of those times: crude, blatant, racist stereotypes found in the pages of even mainstream media, such as *Life* and *Look* magazines, where the Japanese were depicted in the worst possible light (Bailey, 1972; McWilliams, 1944; tenBroek, *et al.*, 1954). Still worse were comic books, pulp magazines, and the movies—which then exerted a powerful influence in shaping the ideas and values of the young men about to be drafted and sent to war—frequently portraying

the Japanese as subhuman sadists, or even as lecherous dwarfs lusting after American womanhood.

Although there were also media campaigns against German and Italian immigrants, these campaigns were of far less viciousness than the one generated against the Japanese-Americans. The Hearst press, sometimes accused of using sensationalism to beef up its flagging sales, printed lurid stories depicting the Japanese-American people as squat, buck-toothed, and devious. The *Los Angeles Times* and other newspapers quickly followed suit, daily proclaiming the most bizarre tales of imminent attacks by Japan on California shores, aided by the "traitorous" Japanese-Americans. Spurious rumors of a mass Japanese invasion of the West Coast often created sensational banner headlines, such as "Immediate Evacuation of Japanese Demanded" in the *Los Angeles Times* on February 25, 1942 (Bailey, 1972).

In California, leading forces in the public outcry urging that the Japanese-Americans be incarcerated were often wealthy landowners and influential ranchers and farmers, who stood to gain the most from the removal of all Japanese-Americans from valuable agricultural property. Historically, large landowners, together with some of the most powerful individuals in the California legislature, had constituted the driving force behind various Asian Exclusion Laws, such as the Chinese Exclusion Act of 1882. After they had successfully halted Chinese immigration, they had turned their attention to the Japanese-Americans, raising demands to halt Japanese immigration, to prevent Japanese-American ownership of land, and to banish the Japanese-Americans to the worst strips of land in the San Joaquin Valley. They were the forces spearheading the Japanese Exclusion League, the Native Sons of the Golden West, and the Joint Immigration Committee, all of which sought to deny Japanese-Americans the most basic of the rights supposedly guaranteed in the Bill of Rights (Daniels, 1972; Grodzins, 1949).

At the turn of the century, California's wealthy landowners had induced the California legislature to pass laws excluding

Asian women, in order to prevent Asian immigrants from permanently settling and procreating in California. In 1913, the Alien Land Law was passed, which forbade Japanese ownership of land in California. In the 1923 landmark *Ozawa* case, the U.S. Supreme Court held that Congress could deny Japanese-Americans eligibility for naturalization because the Founding Fathers had never contemplated the presence of Japanese in this country (Bailey, 1972). In 1924, Congress was pressured to pass the Japanese Exclusion Act (Bailey, 1972). Now that the Japanese-Americans had turned swamps and barren fields into lush agricultural areas, the wealthy landowners were officially proclaiming in the legislature: "Either the White man or the Yellow man will prevail in the Valley" (Daniels, 1962, 1972; Bailey, 1972).

For the Japanese-Americans, there was little advance warning when President Franklin Roosevelt signed Executive Order 9066 in February 1942, pursuant to which there began the largest roundup of Americans in the history of the United States. At first, only Japanese-American civic leaders and religious figures were systematically rounded up, so that the community was deprived of any leadership that could mount a coordinated response. Terminal Island in Southern California was the scene of perhaps the most vicious attacks against Japanese-Americans, where over six hundred Japanese-American males had already been arbitrarily imprisoned even before the evacuation orders were signed. For most Japanese-Americans, the actual orders to leave for the camps gave only a few days' warning, but on February 26, 1942, General John L. DeWitt gave the Terminal Island residents only *forty-eight hours* to pack. This meant liquidating entire belongings, the sum total of decades of sweating beneath the often blistering California sun, by hurriedly holding forced sales on their front lawns (Bailey, 1972; Kitagawa, 1967; Kitsuse, 1956; Modell, 1973).

Many Japanese-Americans cried bitterly when their neighbors, whom they had known and trusted for years, came by and casually flicked pennies and nickels to purchase priceless artworks and valuable furniture. Bargain hunters, opportunists,

scavengers, and plain thieves converged on the Japanese-American community. One Japanese-American vividly described the humiliation and pain:

People were in panic. Businesses were sold at great sacrifice. . . . In some cases, expensive equipment was destroyed by the owners who could not bear to part with it at the ridiculously low prices that were being offered. Junk men and non-Japanese neighbors swarmed to the Island, purchasing their furniture for practically nothing. Stealing was a frequent occurrence during these two days. The government did not provide trucks to move furniture, and many of the people did not have enough money to pay to have it moved, so they left it behind. (Poston Collection, 1945; Bailey, 1972, pp. 32-33)

Wealthy farmers and bankers quickly moved in to take over abandoned farms, restaurants, greenhouses, fisheries, and other properties. As a result, Japanese-American farmers lost 5,135 farms, covering 226,094 acres in the San Joaquin Valley, with a market value of about \$70 million in 1940 dollars. Overall, the Federal Reserve Bank estimated the loss to the Japanese-Americans to be \$400 million (Bailey, 1972; Gardner and Lottis, 1969). Today, the market value of this prime California real estate, centered in the breadbasket of the state and the heartland of U.S. agribusiness, is considered almost incalculable but is measured by one estimate in the tens of billions of dollars.

In a state of shock and clutching only what they could carry, approximately 110,000 Japanese-Americans were sent by train to the Santa Anita and Tantoran racetracks to be processed and tagged. In the middle of one of the wealthiest areas of Southern California, the Japanese-Americans faced sentry towers with machine guns, searchlights, armed patrol cars, and helmeted soldiers with rifles. Many were forced to clean up the horse manure in the stables where they stayed for weeks until the camps were ready. Seven people had to share each horse stall, typically measuring only twelve by twenty-four feet (Embrey, 1972; Kitagawa, 1967; Lehman, 1970).

The camps themselves were located on barren, desolate areas far from any population centers. Many of the Japanese-Americans were forced to build the very camps where they would be forced to live for the next four years (Bailey, 1972). Thus living in the face of machine guns, with their assets frozen, and with the barest of medical care and sanitation, these Japanese-Americans found a different meaning of the "American dream." Dysentery and other diseases swept through the camps. Furthermore, the FBI systematically used money and privileges to induce some of the Japanese-Americans to act as informers at the camps (Bailey, 1972).

Isao Fujimoto (1971), who was a terrified eight-year-old child at the time, recounts:

About a week after Pearl Harbor, two FBI agents arrived one night and took my father away. Our family did not see him for another year and a half. My father was in a detention camp in Missoula, Montana, which he described in letters written to my mother. I remember these letters more for their form than their content. They had holes in them scissored out by the censors. (pp. 207-214)

His family was sent to the Portland, Oregon, Assembly Center, where livestock stalls had been hastily converted into family quarters, some still containing fresh hay and manure. He recalled, "We were warned that children had been shot for wandering too close to the barbed wire. Unfortunately, there were incidents which substantiated these fears" (pp. 207-214).

In addition to suffering under these degrading, and at times inhuman, conditions, the Japanese-Americans were asked to sign an oath pledging their loyalty to the United States. Surprisingly, the vast majority quietly complied and signed the oath. (However, they were all incarcerated, whether or not they were U.S. citizens or signed the loyalty oath.)

Eventually, ten large camps were built. In fact, the camps at Poston (with 20,000 people) and Gila River (with 15,000) were large enough to be considered the third and fourth largest cities in

Arizona. California had two camps: Tule Lake (11,000) and Manzanar (10,000). Idaho had Minidoka (10,000). Wyoming had Heart Mountain (10,000). Colorado had Ranada (8,000). Utah had Topaz (10,000). Arkansas had two camps: Rohwar (10,000) and Jerome (10,000). (Arrington, 1962; Bailey, 1972; Weglyn, 1976).

The most notorious conditions were found at Tule Lake, where the government often isolated those individuals who had not signed the loyalty oath. Fujimoto (1971) writes:

Like the others, Tule Lake was a maximum security camp but even more so—with its double roll of barbed wire and cyclone fencing and armed guards in towers spaced every 100 yards around the camp. . . . It was once invaded by troops reinforced by tanks, machine guns, and tear gas bombs. Such was the situation between November 1943 and January 1944, a few months prior to my transfer there. Just four days after our family got there, an army sentry killed a truck driver after ordering him from the truck following an argument concerning a pass. (pp. 207–214)

Meanwhile, wealthy ranchers and landowners quickly confiscated the fields, greenhouses, and land of the Japanese-Americans, and clamored in the legislature for more than just a temporary solution to the problem (Bailey, 1972; Daniels, 1962, 1975). Looking toward the day when tens of thousands of Japanese-Americans would be released from the camps, they demanded a more nearly "permanent solution" to the problem. Among the various bills proposed in the legislature were putting all the Japanese-Americans on an island and detonating the island (this bill had little support) and sterilizing all Japanese-American males (this bill almost passed).

Recently declassified files of that period have shed light on the incarceration of the Japanese-Americans. For example, official records show that a few months before Pearl Harbor, the federal government, believing that Pearl Harbor might be a target of Japanese imperial forces, conducted secret investigations of the Japanese-Americans on the West Coast and in Hawaii. A report

by Special Investigator Curtis Munson, backed by decades of investigation by the FBI and Naval Intelligence, concluded flatly that the Japanese-Americans posed no threat to national security. High government officials, although fully aware of reports like the Munson Report that denied that the Japanese-Americans posed a security threat, chose to ignore them and went ahead to order the incarceration of Japanese-Americans (U.S. Commission on War-time Relocation, 1982; U.S. Congress, 1980). Earl Warren, then attorney general of California, approved. Later, he would become governor of California and eventually Chief Justice of the United States Supreme Court.

Furthermore, during the war, the U.S. government seriously considered using the Japanese-Americans as a "barter reserve" for prisoner exchange with Japan and as a "reprisal reserve" to ensure the safety of American soldiers captured by the Japanese military. The U.S. State Department even pressured Latin American countries (some, like Brazil, with large Japanese immigrant populations) to arrest Japanese-Americans for shipment to U.S. internment camps. Official meetings were held between the United States and Canada to deport the entire Japanese-American population, regardless of citizenship, from North America.

POST-WORLD WAR II TREATMENT OF FORMERLY INCARCERATED JAPANESE-AMERICANS

On June 30, 1946, the War Relocation Authority was finally scrapped. When the camps finally released the Japanese-Americans after the war, the experience of coming back home was often even worse than entering the camps. Many Japanese-Americans were given fifty dollars and a curt goodbye and were sent home, only to find that their assets had been confiscated, their land taken over, their homes in ruin or sold to others, and their shops hopelessly vandalized or boarded over (Bailey, 1972). At Terminal Island, the government had simply bulldozed away the homes of the Japanese-Americans, leaving the island entirely to the U.S.

Navy and the government, and the canneries and the tuna fleet had been confiscated and taken over by others. Those Japanese-Americans who tried to reclaim their valuable farmland were shot at, beaten, and subject to burnings and repeated death threats (Bailey, 1972; Daniels, 1975; Weglyn, 1976).

Alarmed by the homecoming of the Japanese-Americans, the Hearst press, the *Los Angeles Times*, and other media mounted an extensive campaign to keep them out of California permanently. The *Los Angeles Examiner* (1946) promoted efforts of the Veterans of Foreign Wars to amend the Alien Property Act so that "those persons ineligible to citizenship under U.S. naturalization laws . . . could not acquire, lease or transfer real property or water craft."

The Native Daughters of the Golden West proclaimed flatly, "No return of evacuees to the Pacific Coast Area!" The Native Sons demanded that the relocation centers be continued and that a constitutional amendment be passed to deny citizenship to persons born in this country of alien parents (San Francisco *News*, 1944). At the American Legion convention in San Francisco, its commander, Leon Happel (1943), thundered, "We must look at this problem as of 100 years from now, when 150,000 Japanese will have multiplied and multiplied. This is not the time to take the Japanese out of the camps!" (Bailey, 1972, p. 206) In an editorial in the *Los Angeles Herald-Express*, D. A. Stowe (1944) wrote venomously, "Some say under the Bill of Rights and civil liberties they are entitled to the same rights as civilized people. Very well, then, let's scrap those bills" (Stowe, 1944; Bailey, 1972, p. 211).

It is clear that the Japanese-Americans did not pose much of a security threat to the United States. Drafttees from the camps fought admirably, even heroically, in the U.S. Army's 442nd Division (even though their loved ones were still in detention camps behind barbed wire and machine guns), and Japanese-Americans did not engage in any acts of sabotage at any time (Allen, 1966; Bailey, 1972). Public fears that the Japanese-Americans would give the Imperial Japanese Air Force directions for an invasion on shortwave radio were groundless and proved to be more the

product of the fevered imagination of pulp magazine editors. Even in Hawaii, where the Japanese-Americans made up a heavy plurality of the population and where a plausible case could possibly be made for the danger of security risks, there were no acts of sabotage, even though the Japanese-Americans in Hawaii were never rounded up. In fact, Hawaii's 298th and 299th National Guard Infantry units were entirely Japanese-American (Murphy, 1955).

What is disturbing, however, is that we now know, from the Munson Report and other official studies that have been declassified, that the authorities all along had realized that the Japanese-Americans did not constitute a security threat. Nevertheless the Japanese-Americans had been ordered into camps. For example, at the Conference on Evacuation of Enemy Aliens held at the Newhouse Hotel in Salt Lake City on April 7, 1942, Colonel Carl R. Bedetsen (Assistant Chief of Staff of the Western Defense Command) stated, "They [the Japanese-Americans] are law-abiding; they have not been guilty of overt acts." However, in the same breath he called for their immediate imprisonment (Poston Collection, 1945; Bailey, 1972, p. 41).

TOKEN COMPENSATION TO JAPANESE-AMERICANS

Even forty years later, when many wounds had healed, the drive to compensate the Japanese-Americans for even a token minuscule fraction of their loss met with considerable opposition from powerful sectors of American society. In fact, on the McNeil-Lehrer Report, one of the key architects of the wartime relocation said, "I would do it all over again, if I had the chance."

The declassification of the files of the FBI proved pivotal in turning the tide at the congressional debate in the 1980s, concerning retribution for the Japanese-Americans. After four decades, the Civil Liberties Act of 1988 was passed by Congress and was signed by President Ronald Reagan, giving twenty-thousand dol-

lars to all living Japanese-Americans who had been incarcerated in the camps.

Although this measure was rightly hailed as a long-awaited victory for the Japanese-American community and for civil rights, it should also be noted that roughly half the Japanese-Americans who had been interned had already died. The money was to be given out over a period of several years, during which many more would die. Many Japanese-Americans, quoted in the press, were grateful for the money, but some pointed out that this sum constituted pocket money, representing only the tiniest fraction of the current worth of their confiscated California real estate. Sadly, for all the publicity given to the reparations, the funds were held up by President George Bush, and only now are the very first payments being made.

CIVIL LIBERTIES IMPLICATIONS OF THE WORLD WAR II JAPANESE-AMERICAN EXPERIENCE

Looking at this unsavory period of United States history, do we see it as just an anomaly, an aberration in our history, a nightmare from which we have just awakened? Or does it point to another facet of our nation, one that is rarely taught about to our schoolchildren and that is pointedly ignored in public discussion? Do we have to be reminded of the terror faced by native Americans and African-Americans to realize that there is another insidious side to American history, a side that will never be fully taught in our schools?

From the larger historical perspective, the Japanese-American internment shows that the United States, which prides itself on its civil liberties, is not totally immune to the same forces that have for hundreds of years caused untold misery in Europe, with its bloody history of pogroms and persecutions. A closer analysis of the social and political forces at work shows an uncomfortable similarity between the Japanese-American internment and the persecutions in Europe. In both cases, we see (1) a government

that needed to sacrifice a convenient scapegoat, in order to foster unquestioning patriotism; (2) a minority group that could be singled out and isolated, that could be easily identified, and that lacked a history of fighting back against exploitation; (3) a class of wealthy individuals who could materially benefit from the confiscation of this minority's property and could provide a powerful social impetus to carry out and sustain the campaign against this minority in every community; and (4) compliant or cooperative news media and public spokespeople willing to propagandize widely in a campaign skillfully designed to portray this minority as something less than human.

The Japanese-American incarceration has far-reaching, profound implications for the future of American society, far beyond the question of racism or wartime hysteria. For example, despite repeated attempts to destroy these camps, some of them still exist and were partly refurbished during the Nixon years. The public record of the Watergate years reveals that President Nixon harbored hidden designs against his enemies, whether they were prominent critics or entire groups of people. I believe that he would have clearly benefited from the incarceration of liberals and activist African-American leaders. Indeed, the reason for his creating a massive security apparatus was to keep tabs on his domestic opponents.

More recently, during the Iran/*contra* affair, when many previously classified documents were made public, it was revealed that Lieutenant Colonel Oliver North had been intimately involved in a plan that included the possibility of incarcerating large numbers of American citizens who might oppose an invasion of Nicaragua by the U.S. military (Knight, 1988).

It is revealing that the National Security Council (the highest advisory group in the federal government) took such a measure seriously (Knight, 1988). This indicates that, at some disturbingly high levels of government, there are still powerful individuals who consider mass arrests and detention camps a suitable solution to domestic problems.

The legal machinery that made the incarceration possible is

still largely on the books, and the United States Supreme Court ruled that the evacuation was constitutional. More specifically, in 1943 the Supreme Court ruled that it was constitutional to jail George Hirabayashi, a Quaker and a senior at the University of Washington, for having violated the curfew laws against Japanese-Americans, which banned them from the streets from 8 P.M. to 6 A.M. And in a landmark decision, a majority of the Court on December 18, 1944, held that it was constitutional to have jailed Fred Korematsu for having refused to evacuate under Civilian Exclusion Order No. 34 (Bailey, 1972).

Three Supreme Court justices, however, dissented from the majority. One of them, Robert H. Jackson, raised some profound issues when he wrote that the decision "for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. . . . The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need" (Bailey, 1972).

Title II of the McCarran Act authorizes the U.S. Attorney General to issue a warrant for "the apprehension of each person as to whom there is a reasonable ground to believe that such person probably will engage in or probably will conspire with others to engage in acts of espionage and sabotage" (Bailey, 1972). Ultimately, who will decide what are the "reasonable grounds" that justify the arrest of those who "probably will conspire" to commit crimes? The Supreme Court will; but can it be depended on to make a morally correct decision?

The subsequent Warren Court, ironically a "liberal" court, did little to overturn the sedition acts that had been implemented against the Japanese-Americans by the California Attorney General, Earl Warren himself, who said, "Unless something is done it ['the Japanese situation'] may bring about a repetition of Pearl Harbor" (Grodzins, 1949, p. 94). Warren proposed the bizarre theory that the very fact that there had not yet been any sabotage by the Japanese-Americans was "the most ominous sign in our whole situation," because it allegedly had shown that they were

quietly waiting for the signal from Tokyo to start mass uprisings. Columnist Walter Lippman agreed with Earl Warren when he wrote that the lack of acts of sabotage was "a sign that the blow is well organized and that it is held back until it can be struck with maximum effect" (Bailey, 1972). This line of reasoning also has wide-ranging ramifications for civil liberties, because it argues that the very lack of any past crime constitutes strong justification for imprisoning certain peoples.

Although it is commonly believed that the United States Supreme Court has since overturned the decision to incarcerate the Japanese-Americans, this belief is, unfortunately, not true. In the nearly five decades since the landmark *Hirabayashi* and *Korematsu* cases, the Supreme Court has never ruled the evacuation orders to be unconstitutional and has never reversed itself on these cases (Deale, 1990). In fact, many of the acts on subversion passed by Congress in the 1950s, during the McCarthy period, are still on the books. Although the Supreme Court has clarified its stand on certain provisions concerning the rights of those whom the government might deem to be "subversive" it has never reversed itself on any of the evacuation orders (Deale, 1990).

Furthermore, the legal ability of the courts to uphold the incarceration of over a hundred thousand people without charges raises disturbing questions about due process. Fujimoto (1971) writes:

We were told that the FBI wanted leaders. My father was a farmer and also an experienced carpenter. Because of his skills, people in the community relied on him to direct the building of a Buddhist temple in the little town in which I grew up. To the FBI he was a leader and thus taken away. The suspect in such a situation is no different from the prisoner described in Kafka's *The Trial*, where the suspect never knows the crime for which he is charged or why he is arrested; or he can be like Camus' *The Stranger*, who is never addressed by name, not even by his lawyer who does not regard him as human.

Moreover, the power of the information media to portray overnight any minority in the worst possible light remains undiminished. In fact, the greater centralization of the print and electronic media under powerful media conglomerates and monopolies in the postwar era at least theoretically facilitates such a campaign. The United States government cannot possibly launch a campaign against a minority without a media campaign to arouse public opinion. On a much smaller scale, we recently saw the power of the media to whip up anti-Iranian sentiment, which resulted in the deportation, harassment, and even the shooting of Iranian students in the United States. And during the energy crisis in the late 1970s, lurid ads were printed portraying Arabs strangling the gas pumps and menacing our energy jugular vein. Justified or not, these media campaigns clearly showed the enormous power of the media in creating, in a surprisingly short period of time, hostile images of people, which are absolutely essential before any governmental action can realistically be taken against them.

The United States has come a long way from the old days, when blatant, overtly racist stereotypes blared from the pages of the Hearst and other press, but the ability to create a campaign against real or perceived enemies is fully intact and more potentially powerful than ever before, as was seen in anti-Arab, Iraq, and Palestinian sentiments in the recent (1990–1991) Persian Gulf war.

In theory, if the U.S. government felt that it was threatened by undesirable elements within its society, it could revive all the legal and political machinery necessary to round up another hundred thousand or more people on relatively short notice. Although such a repetition appears unlikely at the present time—especially because minority groups have slowly begun to understand how to fight back against such measures—the very fact that the machinery is still intact and that the government has consciously decided to keep the machinery intact is an ominous note.

When we think of a crime, we usually think of the violation of law. But when the people who make the laws decide to persecute a

minority systematically, then what happens? Alexis deTocqueville, the noted French historian, was an astute observer of American politics and mores. Although he admired this experiment in democracy, he shuddered at the potential harm that a democracy could commit if ever its majority democratically and willfully decided to unleash evil, in the form of wars or persecutions. Then it would not be an isolated king or dictator coercing a reluctant people against its will; it would be an aroused, unthinking citizenry acting as one to commit a heinous crime.

CONCLUSION

Of course, the damage has already been done. However, those who never learn from their mistakes are doomed to repeat them. Perhaps we can make sure that crimes against peoples never take place again in America if we follow a few simple but important recommendations:

1. The U.S. Congress should abolish the various sedition laws; the U.S. Supreme Court should rule unconstitutional the incarceration of a person or persons without due process.

2. We should physically destroy all remnants of the relocation camps, restoring some as museums.

3. We should incorporate the history of the Japanese-Americans, and other minorities, as required reading in all high schools.

4. The government should set up a multiracial commission or watchdog group to make sure that another such incident never happens in our history.

Ultimately, it will depend on all the citizens of this country to ensure that arbitrary racist incarcerations will never happen again. We must remember that the failure to raise a public outcry when racial minorities are unjustly attacked will ultimately pave the way for much larger injustices.

As Pastor Martin Niemoller once said, "In Germany, they came for the Communists and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up

because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics and I didn't speak up because I was a Protestant. Then they came for me—and by that time there was no one left to speak up."¹

NOTES

1. The following sources expand on the material covered in this chapter: Hersey (1988); Hosokawa (1971); Leo (1988); *Los Angeles Examiner* (1946); Matsumoto (1946); Myer (1971); Renne (1954); Thomas (1942); U.S. Department of the Interior (1946); U.S. War Department (1943).

REFERENCES

- Allen, C. (1966). *Concentration Camps, U.S.A.* New York: Marzani & Munsell.
- Arrington, L. (1962). *The Price of Prejudice: The Japanese American Relocation Center in Utah in World War II.* Logan: Utah State University Press.
- Bailey, P. (1971). *City in the Sun: The Japanese Concentration Camp at Poston, Arizona.* Los Angeles: Westernlore Press.
- Bailey, P. (1972). *Concentration Camp U.S.A.* New York: Tower.
- Daniels, R. (1962). *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion.* Berkeley: University of California Press.
- Daniels, R. (1972). *Concentration Camps USA: Japanese Americans and World War II.* New York: Holt, Rinehart & Winston.
- Daniels, R. (1975). *The Decision to Relocate the Japanese Americans.* Philadelphia: J. B. Lippincott.
- Deale, Frank. (1990). Interview. New York: Center for Constitutional Rights.
- Embry, S. K. (1972). *The Lost Years: 1942–46.* Los Angeles: Manzanar Project/Moonlight Pub.
- Fisher, A. R. (1965). *Exile of a Race.* Seattle: F & T.
- Fujimoto, I. (1971). "The Failure of Democracy in a Time of Crisis." In

- Roots: An Asian American Reader*. Berkeley: University of California Regents.
- Girdner, A., and Loftis, A. (1969). *The Great Betrayal: Evacuation of the Japanese Americans during World War II*. New York: Macmillan.
- Grodzins, M. (1949). *Americans Betrayed: Politics and the Japanese Evacuation*. Chicago: University of Chicago Press.
- Grodzins, M. (1956). *The Loyal and the Disloyal: Social Boundaries of Patriotism and Treason*. Chicago: University of Chicago Press.
- Happel, L. (1943). *The Daily Californian*, Berkeley, August 19.
- Hersey, J. (1988). "Behind Barbed Wire." *The New York Times Magazine*, September 11.
- Hosokawa, B. (1971). "The Cherishing of Liberty." In *Roots: An Asian American Reader*, Berkeley: University of California Regents.
- Kitagawa, D. (1967). *Issei and Nisei: The Internment Years*. New York: Seabury Press.
- Kitsuse, J. (1956). *The Managed Casualty: The Japanese American Family in World War II*. Berkeley: University of California Press.
- Knight, R. (1988). *Undercurrents*. Los Angeles: Pacifica Foundation.
- Lehman, A. (1970). *Birthright of Barbed Wire: The Santa Anita Assembly Center for the Japanese*. Los Angeles: Westernlore Press.
- Leo, J. (1988). "An Apology." *Time*, May 2.
- Los Angeles Examiner*. (1946). May 20.
- Matsumoto, T. (1946). *Beyond Prejudice: A Story of the Church and Japanese Americans*. New York: Friendship Press.
- McWilliams, C. (1944). *Prejudice: Japanese Americans: Symbol of Racial Intolerance*. Boston: Little, Brown.
- Modell, J. (1973). *The Kituchi Diary: Chronicles from an American Concentration Camp*. Urbana: University of Illinois Press.
- Murphy, T. D. (1955). *Ambassadors in Arms: The Story of Hawaii's 100th Battalion*. Honolulu: University of Hawaii Press.
- Myer, D. (1971). *Uprooted Americans: The Japanese Americans and the War Relocation Authority during World War II*. Tuscon: University of Arizona Press.
- Poston Collection. (1945). *Poston Chronicle*. Colorado River Relocation Center, Colorado.
- Renne, L. O. (1954). *Our Day of Empire War and Exile of Japanese Americans*. Glasgow, Scotland: Strickland Press.
- San Francisco News*. (1944). March 9, March 27.
- Spicer, E. H., Hansen, A., Luomala, K., and Opler, M. (1969). *Impounded*

- People: Japanese Americans in the Relocation Centers*. Tuscon: University of Arizona Press.
- Stowe, D. A. (1944). *Los Angeles Herald-Express*, May 26.
- Sundquist, E. J. (1988, August). "The Japanese-American Internment." *The American Scholar*.
- tenBroek, J., Barnhart, E., and Matson, F. (1954). *Prejudice, War, and the Constitution*. Berkeley: University of California Press.
- Thomas, N. (1942). *Democracy and Japanese Americans*. New York: Post War World Council.
- U.S. Commission on Wartime Relocation and Internment of Civilians: Personal Justice Denied. (1982). Washington, DC: Government Printing Office.
- U.S. Congress. (1980). Senate Committee on Governmental Affairs, Committee on Wartime Relocation and Internment of Civilians Act. Washington, DC: Government Printing Office.
- U.S. Department of the Interior. (1946). *War Relocation Authority Books*, Vols. 1-12. Washington, DC: Government Printing Office.
- U.S. War Department. (1943). *Final Report: Japanese Evacuation from the West Coast, 1942*. Washington, DC: Government Printing Office.
- Weglyn, M. (1976). *Years of Infamy: The Untold Story of America's Concentration Camps*. New York: William Morrow.

The Law and Morality of War Crimes Trials

SANDER LEE, PH.D.

INTRODUCTION

In this chapter, I raise various issues that are related to questions of both morality and law, particularly with reference to the war crimes trials that have taken place as a result of the horrible, devastating atrocities that occurred during World War II. These issues are extremely controversial. Perhaps precisely because of the tendency to become emotional in such discussions, it is essential to raise these questions in a philosophical manner as part of an analysis of the nature and role of the law in such proceedings. In saying this, I do not mean to imply that our strong outrage at the atrocities of the Holocaust should be completely ignored. Instead, I am suggesting that such an analysis will allow us to recognize more authentically the precise role that our common emotional revulsion to the Holocaust has played in our legal attitudes toward such trials.

This chapter will argue briefly for the following points:

1. The commonly accepted natural-law justification for such trials is inaccurate and misleading. Natural-law theorists believe that the law has its source in some ultimate set of universal moral

principles. In fact, calling for the use of a natural-law theory too readily in such cases can allow us to believe that important distinctions (e.g., between revenge and morally justified punishment) have already been established when in fact they have not.

2. The positive-law account is a more honest description of what actually occurred in such trials as it recognizes the painful fact that retroactive law was employed. A positive-law theorist believes that the law is whatever is written into the law books in accordance with the procedures established by a society.

3. Despite this use of retroactive law, past war crimes trials can be justified on the basis of a variety of differing moral theories; yet recognition and honest acceptance of the use of retroactive law in such cases enable us to clarify the fundamental issues involved so that we will be obliged to deal authentically with them in the future.

4. Recent events in nations such as Romania indicate that such procedures continue to be needed. In the process of making this argument, I will define the notions of natural law, positive law, and retroactive law for those readers unfamiliar with them.

RECENT WAR CRIMES TRIALS

Here is an excerpt from the televised transcript of the military tribunal held in Bucharest, Romania, on December 25, 1989, in which deposed Romanian President Nicolae Ceausescu and his wife, Elena, were charged with crimes against the country. They were executed by firing squad the same day:

Nicolae Ceausescu: "I do not answer the question. I will only speak before the grand National assembly. I do not recognize this court. The charges are incorrect, and I will not answer a single question here." Prosecutor: "In this same way he refused to hold a dialogue with the people, now he also refuses to speak with us." (*New York Times*, 1989, p. 7)

In order to avoid such use of the dubious device of retroactive law in the future, an international tribunal ought to be established now that would be empowered to investigate, try, and even punish offenders in the event of a repetition of such crimes. The establishment of such procedures would require the international community to construct an apparatus for making these distinctions in advance. This proposal has the added advantage of allowing diverse groups (e.g., democratic governments, Marxist governments, and Islamic governments) to agree on fundamental procedures while allowing them the flexibility to ground their moral claims in accordance with their differing cultural, religious, and ideological preferences (assuming this is possible or feasible).

The issue of the morality and the legal status of war crimes trials is one that has troubled people since the end of World War II, that is, since the revelation of the horrors of the Holocaust, obviously one of the most horrendous and massive crimes of human history. The Holocaust is almost impossible to contemplate, yet it still must be discussed: the issue of war crimes trials has again become one of strong contemporary interest because of the many individuals who have recently been informally accused of participating in the Holocaust (e.g., Kurt Waldheim) or who have actually been brought to trial as a result of such accusations (e.g., Klaus Barbie, John Demjanjuk, and Karl Linnaas).

The moral and legal dilemmas that are raised by war crimes trials can best be seen if we look briefly at one recent example. The trial of John Demjanjuk, a retired auto worker who had lived in Ohio since the end of World War II, took place in Jerusalem (*Boston Globe*, 1987, p. 1). Demjanjuk, sixty-six, a native of the Soviet Ukraine, was accused of having been a guard at the Treblinka concentration camp located in Nazi-occupied Poland. In Treblinka, 850,000 Jews were killed in 1942–1943. There Demjanjuk was known as "Ivan the Terrible," who beat and mutilated prisoners and then forced them into chambers where they were killed by poison gas. Demjanjuk maintained that he had never been at the Treblinka camp. He said he was a victim of mistaken identity.

For the sake of argument, I will assume that Demjanjuk was in fact the man known as "Ivan."

"Ivan" was identified by many death camp survivors. One such witness described how the prison guard had fatally shot a girl as she had tried to escape under a fence. Another described the guard in this way:

There is Ivan the Terrible. I dream about him every night. I see him, I see him, I see him. When we were told to remove the corpses, Ivan came out of the engine room and beat us mercilessly with a pipe or sword or bayonet. He would crack skulls and cut off ears and commit the most indescribable atrocities to the corpses. I think the human brain cannot grasp it when it is retold (*Boston Globe*, 1987, p. 1)

The issues raised by Demjanjuk's trial also relate to the trials that took place in Nuremberg and Japan immediately following World War II. And of course, they additionally relate to the trial of Adolf Eichmann, one of the worst Nazi war criminals, which took place about thirty years ago in Israel. They involve the legal procedures under which Demjanjuk was tried.

It is clear that one can be horrified by the atrocities of the Holocaust, believe them to encompass the very essence of evil, and yet still feel that it is important to understand the legal status of the World War II war crimes trials. The legal issues surrounding such trials have been debated ever since the proposal to hold them was first made before the end of World War II. One problem in conducting such trials is that the people who are to be tried were acting in accordance with the laws of their own country at the time that they committed these atrocities. Surprisingly, the Nazis were quite meticulous about changing the laws of the Weimar Republic in order to legalize the acts they committed. One of the ways in which they did this was by depriving certain groups of their citizenry.

Demjanjuk emigrated to America from the Ukraine apparently in the years right after World War II. He became an American

citizen and spent a period of forty years living and working as an auto worker in Cleveland, Ohio (*Boston Globe*, 1987, p. 1). Apparently, he committed no crimes in the United States. In 1986, he was arrested and extradited to Israel, where he was tried under Israeli law and faced a possible death penalty. Of course, Demjanjuk was not being tried for crimes he had committed in Israel. He had never visited Israel. In fact, he was being charged with committing crimes in a country that no longer existed by a government that did not exist at the time the acts were committed.

Obviously, no matter what position one takes on this issue, it is clear that there are some legal questions that deserve serious consideration. One important principle involved in the law holds that justice should be distributed impartially. Justice is often portrayed as a blindfolded woman holding a scale. This figure implies that a system of justice should not discriminate on the basis of society's unfettered feelings toward the defendant or toward the crime of which the defendant is accused. This is the case even when those crimes are the most horrible imaginable. All individuals are supposed to have the same rights under the law. Therefore, in justifying this kind of trial, we must answer some of these questions, no matter what our feelings about the horrible-ness of the crime, our desire for retribution, or our need to make an example of the defendant.

EX POST FACTO QUESTIONS IN WAR CRIMES TRIALS

One of the legal problems that faced the United States in 1945 regarding the Nuremberg trials stemmed from the fact that Article 1, Section 10, of the U.S. Constitution prohibits the creation of *ex post facto* (i.e., retroactive) laws. At the time, many important legal theorists on both sides of the political spectrum were concerned about this issue.

On October 6, 1946, ten days before the convicted Nazis at Nuremberg were scheduled to be executed, Senator Robert Taft

(generally regarded as having conservative political and social views) stated the following in an address titled "Equal Justice under Law":

The trial of the vanquished by the victors cannot be impartial no matter how it is hedged about with the forms of justice. I question whether the hanging of those, who, however despicable, were the leaders of the German people, will ever discourage the making of aggressive war, for no one makes aggressive war unless he expects to win. About this whole judgment there is the spirit of vengeance, and vengeance is seldom justice. The hanging of the eleven men convicted will be a blot on the American record which we shall long regret. In these trials we have accepted the Russian idea of the purpose of trials—government policy and not justice—with little relation to Anglo-Saxon heritage. By clothing policy in the forms of legal procedure, we may discredit the whole idea of justice in Europe for years to come. In the last analysis, even at the end of a frightful war, we should view the future with more hope if even our enemies believed that we had treated them justly in our English-speaking concept of law, in the provision of relief and in the final disposal of territory. (Kennedy, 1956, p. 191)

Supreme Court Justice William O. Douglas (generally regarded as having liberal political and social views) wrote in the early 1950s:

But what kind of trial is this? No matter how many books are written or briefs filed, no matter how finely the lawyers analyze it, the crime for which the Nazis were tried had never been formalized as a crime with the definiteness required by our legal standards. Nor outlawed with the death penalty by the international community. By our standards that crime arose under an *ex post facto* law. Goering et al. deserve severe punishment but their guilt did not justify us in substituting power for principle. (Kennedy, 1956, p. 190)

There is a problem with creating laws after the commission of an act and trying people for their lives on the basis of those laws. In these cases, there is often the additional legal problem (not considered here) that the people making these decisions have not in fact been elected by the populace of the nations in which the accused acted. However, I fully recognize and share the feeling that something should have been done, that these people had to be punished in some way, and that we could not simply let them go unpunished as we might let defeated enemies go unpunished after a more honorable kind of war.

The question is: What should we have done? It is a difficult issue for those who take principles of justice seriously. Here are a few of the alternative suggestions that have been proposed for dealing with this issue. One of the most famous arguments has been made by a German lawyer named Gustav Radbruch (1973, pp. 327–329, 617–621). Before World War II, Radbruch took a position that is very often identified with positivism, but after the war, he changed his position into what is very often called a natural-law position.

THE POSITIVE-LAW THEORIST'S APPROACH

First, let us briefly distinguish between the positive-law and the natural-law approaches to the nature of law. This is a fundamental issue in the philosophy of law, one that cannot help but interrelate with moral philosophy. My explanation of these positions will be brief and will admittedly tend to simplify theories that are of great complexity and richness. Positive-law theories, such as those of John Austin (1885, pp. 167–341), who lived from 1790 to 1859, and Hans Kelson (1927), who lived from 1881 to 1964, tend to agree that the law is a set of rules that are made up by people in order to govern society. These rules are formulated according to different procedures in different societies. Many societies disagree with others on how these rules should come into existence and how they can be modified, repealed, or changed in

any way. For example, in the United States, the Constitution sets up the rules for making laws and changing them. In other countries, those procedures are quite different.

A positive-law theorist believes that law is whatever is written into the law books in accordance with the procedures established by a society. For a contemporary positive-law theorist, such as H. L. A. Hart (1980), a rule is a law if it was written in accordance with the procedures established by a society, and it gains its legitimacy through its general acceptance by the community.

A positive-law theorist would concede that such a law might in fact violate our moral principles or at least some people's moral principles. When we come to believe that a law is immoral, there are various courses of action we can follow. We can, of course, work within the system to change the law, or we can choose to engage in civil disobedience to challenge the law. Ultimately one could take up arms in rebellion against the government in order to overthrow a system that is perceived as unjust. Yet positive-law theorists maintain that, although issues of the law and issues of morality are generally separate, they may sometimes overlap or even clash, but they are never necessarily identical. Often the law and morality do overlap. Often what is legal is also what is moral. But sometimes it is not.

Positive-law theorists tend to see the law as a risk-benefit system. The law is basically a kind of contract; it tells you what will happen to you if you are charged with violating its provisions. You may still choose to break the law despite these penalties. Obviously people do this everyday. One might rationally decide that the rewards of violating the law outweigh the penalties imposed.

THE NATURAL-LAW THEORIST'S APPROACH

The natural-law approach, on the other hand, has its source in Greek philosophers such as Plato and Aristotle (see Plato's *Republic* or Aristotle's *Nicomachean Ethics*). It was advocated vigorously by the medieval philosopher Aquinas (see Aquinas's *Summa contra*

Gentiles). The natural-law philosophers and theologians believed that the law is not simply a set of rules made up by people, rules that may differ from country to country. They believed that the law has its source in some ultimate set of universal moral principles. Some of these natural-law theorists, such as Aquinas, believed that these moral principles come from God. Other natural-law theorists, to this day, claim that these principles can be derived from the correct use of reason or from the natural order of things (see Gustav Radbruch's *Rechtsphilosophie*, 1973). But all natural-law theorists believe that the law is truly a set of universal moral principles that apply to all human beings, to all rational creatures, and at all times and under all circumstances.

Furthermore many natural-law theorists believe that all human beings in all societies possess the capacity to recognize these universal moral laws (see Aristotle's *Nicomachean Ethics*). Although some natural-law theorists, such as Hegel, might claim that these laws are available only to those who have a special capacity or virtue, who have great education, or who belong to a particular culture, nevertheless, for the purposes of this chapter, I will discuss initially only those naturalists, such as Aristotle, who would agree that these laws are universal laws that are available to all people at all times. Such natural-law theorists, therefore, would believe that it is one's right and duty to prosecute individuals who violate these natural laws, regardless of whether those acts have violated the rules of their particular society. Obviously this approach is one very attractive way to deal with the problems of a war crimes tribunal.

THE POSSIBLE WEAKNESS IN THE POSITIVE-LAW APPROACH

In his book *Rechtsphilosophie* (1973, pp. 327–329, 617–621), Gustav Radbruch argues that positive-law theory contributed to the kind of attitude that allowed the Holocaust to take place. He maintains that anti-Nazi German lawyers and jurists allowed the

Nazis to succeed by concerning themselves solely with proper legal procedures as opposed to the immoral nature of the content of the new laws. As Hitler was meticulous about changing the law in accordance with the formal procedures of the Constitution of the Weimar Republic, Radbruch claims that the positive-law attitude was not sufficient to maintain the morality of the Nazi legal system. Lon Fuller (1980) also propounds this position.

THE POSSIBLE WEAKNESS IN THE NATURAL-LAW APPROACH

H. L. A. Hart (1980, pp. 69–87), on the other hand, argues that the interpretation by Radbruch and Fuller raises more problems than it solves and that, in the long run, the solution to this problem must begin in the context of positive-law theory. In the first place, Hart points out, it would be very difficult to distinguish between just and unjust laws if, in fact, one claims, as Radbruch did, that by definition all “laws” are just: according to the natural-law position, in order for something to be called a “law,” it must accord with universal moral laws. Thus, according to Radbruch, an immoral bill that passed the House and Senate, was signed by the President, and was enforced by the American courts would not really be a law. It would look like a law in that it would have a bill number, would be in the law books, and would be enforced. If a person were to be arrested for violating it, then he or she would be brought to trial and, if convicted, would be sentenced to jail. It would possess all the characteristics normally associated with a law, but according to the natural-law theorists, it would not really be a law. But, Hart asks, what would it be?

A RESOLUTION OF THE PROBLEM OF NOMENCLATURE

It is much easier and less confusing if we simply agree to accept the common usage of the word *law* as referring to all

procedurally valid enactments; I will do so for the remainder of this chapter. This pragmatic choice does not imply in any way, however, that laws cannot be unjust or that the distinction between just and unjust laws is not a vital one. Indeed, as a positivist primarily interested in such matters, I would argue that resolving such linguistic confusions can only help in the process of isolating and examining issues of justice. For the point here is not whether procedurally valid enactments can be unjust (both positivists and naturalists would agree that they can), but whether the issue of the legal status of such an enactment is identical to the issue of its moral status. The positivist argues that these are two entirely separate issues, each deserving of consideration, whereas the naturalist claims that the legality of a procedurally valid enactment depends entirely on its moral status.

A question arises about how positivists would resolve issues of justice. How do they propose to determine the moral status of a law? Here positivists are free to differ immensely. As the positivist position separates the legal issue from the moral issue and attempts to resolve only the former, positivists may approach moral questions from a range of perspectives. In other words, a positivist position on the nature of the law does not necessarily imply any specific normative content. Positivists are free to choose whichever ethical stance seems most persuasive to them. Thus it would not be logically inconsistent for two positivists to disagree vehemently on any specific moral issue. Accordingly we are led to another point related to war crimes trials.

THE VARIETIES OF CULTURAL DISAGREEMENTS OVER NORMATIVE ISSUES

One of the most striking moral implications of the Holocaust lies in the fact that it vividly demonstrates that human beings can violently disagree concerning the moral principles that they adopt. The fundamental assumption underlying natural-law theory states that, although people of good intent may legitimately dis-

agree over many normative issues, ultimately there exists a universal set of underlying basic principles to which we all can and should agree. But in the twentieth century, if we have learned anything it is that people do not agree on many fundamental principles of value. Debates and disagreements over such issues have characterized many international communications. In today's world, there exist great disagreements over such issues, not just between the Soviet Union and the West, but also between the world's many religious and cultural movements. For example, it is very hard for Westerners to conceive of religious or moral principles that could motivate people to engage in suicide attacks against innocent civilians, including young children, yet such attacks do take place in areas of the world such as the Middle East or Ireland.

We know that some people do consider such acts justified. They even see themselves as making heroic sacrifices that have been sanctioned by God. In fact, many such people even believe that they would be violating God's law if they did not engage in these kinds of activities. Thus perhaps the most difficult problem facing some natural-law theorists is not just deciding what these natural laws are, but also persuading others to adopt them or forcibly imposing them on people who disagree.

If alleged natural laws are not written down in advance and we cannot agree on them democratically, how can we be sure we are correct in asserting their validity? There is the danger that an acceptance of natural-law theory could result in some individual's, some small group of individuals', or even an oppressive majority of individuals' seeking to serve as the ultimate judges of this law. The essence of democracy lies in a realization that different individuals may construct their moral values (within limits) in accordance with differing perspectives. The natural-law theory, as narrowly interpreted here, would deny the possibility of legitimate disagreement among well-intentioned, rational individuals on fundamental principles of value. Thus the naturalists' claim that there exist "crimes against humanity" that are known intuitively by all human beings and that may serve as a basis for

criminal prosecution, even in societies that have not agreed to recognize such crimes, cannot be justified. In fact, if anything, the experiences of World War II and the Holocaust have encouraged movements in the field of philosophy (e.g., existentialism, analytic philosophy, and deconstructionism) that have tended to take exactly the opposite approach to the problem of values.

THE APPROACH OF THE EXISTENTIALISTS

Existentialists, such as Jean-Paul Sartre (1947, pp. 50–51), concluded after World War II that, in fact, it is impossible to gain any kind of objective knowledge in metaphysical areas, that is, areas dealing with morality, social philosophy, and religion. There is violent disagreement not only on superficial moral questions, existentialists argue, but on the most fundamental issues of moral theory. Indeed, existentialists tend to say that, in fact, the human condition is one of constant anxiety, of trying to decide what to do, of having to choose in the face of no clear answers. Not to choose, for them, is itself a choice. We are all responsible for the choices we make, completely responsible because our choices are not determined from the outside. We have the free will to create our values. This free-will capacity leads to a great deal of anxiety and despair.

Many people attempt to run away from their responsibilities, to deny the burden of having to decide what they're going to do. An existentialist would say that this is a kind of "bad faith."

On the other hand, inauthenticity is a type of pretending, claiming to possess answers when one knows in fact that there is no way to be sure that any answers are the right ones. Inauthenticity also results from the attempt to shift responsibility for one's acts away from oneself. Of course, the most famous example of people trying to do this is the Nazis themselves. "I was only following orders" was the standard response heard at Nuremberg. Existentialists and others since World War II have argued that this defense is not sufficient. It is always possible to say no, whether

one is in uniform or facing death. Morally, if one is going to be authentic and act in accordance with one's own beliefs, then one must say no, even if it leads to unpleasant consequences. This existential approach was born in the experience of World War II and the Holocaust.

THE IMPACT OF THE HOLOCAUST ON TRADITIONAL BELIEFS

Because of the Holocaust, many people have come to reject traditional beliefs in the inherent goodness of all people and in the existence of a universal set of consistent moral principles. If nothing else, the fact of the Holocaust destroyed the belief formerly held by many intellectuals (not necessarily naturalists) that if people are educated in the proper way in the Western tradition and are exposed to the best of Western culture, then they will necessarily adopt a certain set of moral values and will act in accordance with them. Before World War II, Germany was considered by many people one of the (if not the) most cultured and civilized countries in the world, responsible for many great philosophers, great artists, and great scientists. Yet it was this same country, these same people, who engaged in these horrible acts. Further, many of the people who were responsible for the Holocaust, many of the people who were actually engaged in perpetuating the Holocaust, were among the best educated people in society: the doctors, the lawyers, the people who had been trained most carefully.

We cannot escape the horror of the Holocaust by claiming that only members of a certain cultural environment have the capacity for such acts. Such an attitude displays aspects of the same kind of blind prejudice that produced the Holocaust. Stalin in the Soviet Union and Pol Pot in Cambodia have shown us that non-Germans are also capable of committing such atrocities. Thus, the natural-law claim that all people share a common set of high moral

principles, which are innate in all of us, has been empirically disproved.

The natural-law theorist might here respond that the claim that there are universal principles or values applicable to everyone does not imply that all people will fulfill their capacity to understand or obey such principles. Many people, perhaps even the majority of people, may well suffer from a lack of character or a weakness of will that induces them to act counter to the moral truth. But it does not help the naturalist to retreat into a position that states that only a minority have the capacity or will for moral knowledge and that these people, therefore, have a duty to lead the rest of us into correct moral action despite the majority's evil tendency to reject such proper views.

If it were true, as Plato and Aristotle claimed (see Plato's *Republic* or Aristotle's *Nicomachean Ethics*), that only a small group of people are morally wise, then, of course, that group and only that group should be given complete authority to resolve all of our moral, political, and religious questions. But such thinking is tantamount to advocacy of the very type of undemocratic, totalitarian politics that resulted in the Holocaust. After all, the Nazis believed themselves to be just such an elite. To the extent that the majority disagreed with their views, they would claim that the majority is weak in spirit and incapable of achieving the level of wise understanding that the Nazis had achieved because of the special capacities that only they possessed. Obviously I do not mean to suggest that the natural-law theory implies dictatorship. What I am suggesting is that an unwillingness to respect and accept a broad diversity of views on fundamental moral issues undermines any possibility of reaching the kind of majority consensus that is pragmatically necessary in order to ensure that such atrocities will not occur again.

The natural-law theorist obviously believes that the universe would be a more hospitable place in which to operate ethically if we could come to know the existence of one method of ethical reasoning, a method that could be expected, at least in principle,

to show that, whenever there is a fundamental conflict of values or ethical principles, one and only one solution is correct in some important and relevant sense of "correct." Consequently, the natural-law theorist chooses to believe that such a method does exist.

Yet Sartre would maintain that our lack of certitude in the ethical realm renders the universe much more frightening. He also preferred to believe that rationality can solve all such disputes. Unfortunately, however, Sartre was unable to discover convincing evidence that such a method does exist. For this reason, Sartre believed that it would be bad faith to pretend to oneself that such a rational method is grounded objectively when, at the same time, one is aware that this fact cannot be established. Sartre's description of the disappointment that results from an examination of the foundations of ethics and his analysis of the resulting conditions of anguish and responsibility are, in my view, more authentic responses to the failure to date of the human attempt to ground ethics on any natural or religious basis than are the arguments of those who continue, against all evidence, to claim that we have succeeded.

THE JUSTIFICATION OF GOERING FOR GERMAN ATROCITIES

Yet one could point out that neither authenticity nor procedural correctness is everything. For example, Hermann Goering once wrote, "I declared then, before thousands of my fellow-countrymen, that every bullet fired from the barrel of a police pistol was my bullet. If you call that murder then I am the murderer. Everything has been ordered by me; I stand for it and shall not be afraid to take the responsibility upon myself" (Spielvogel, 1988, p. 70). Here we have an example of the supposedly authentic Nazi (a questionable claim), but that is not here the issue. For our purposes let us assume that Goering honestly and in good faith chose to create his values so as to fulfill all the criteria for

existential authenticity. Would this mean that Goering's views would then have to be accepted by existentialists or that existentialists would then fail to notice the sinister content of those views?

THE RESPONSE BY NATURAL-LAW AND POSITIVIST THEORISTS AND EXISTENTIALISTS

Some natural-law theorists might argue that, because of an emphasis on procedures rather than substance, both existentialists and positivists are more likely to allow such dangerous fanaticism to slip by unnoticed. Indeed, that argument is the heart of Radbruch's postwar attack on the positivists of prewar Germany (1973, pp. 327–329, 617–621). However, both Sartre and Hart would contend that this criticism represents a misunderstanding of both of their positions. In separating legal issues from issues of morality, Hart intends not to ignore moral issues but to place special attention on them. Hart would contend that Radbruch and the other so-called prewar German positivists did not understand positivism at all in that they equated procedurally valid enactments with moral laws, an obvious violation of the positivist code in that positivism vehemently contends that morality and the law are entirely separate affairs. According to Hart (1980, pp. 69–87), the procedural correctness of a law tells us *absolutely nothing* about its moral content. In order to judge such moral content, it is necessary to evaluate that law solely in terms of moral criteria. The entire thrust of the positive-law view is to ensure that no one mistakenly equates a judgment on the legal standing of a law with a judgment made on moral grounds.

By the same token, Sartre (1947, *Existentialism*; 1956, *Being and Nothingness*) argues at great length that, although no set of specific moral norms exist, in the absence of such norms each person must create his own. According to Sartre, however, this act of creation is not arbitrary or whimsical. He compares that creation of ethical values to the creation of a work of art: "When we speak of a canvas of Picasso, we never say that it is arbitrary; we understand quite

well that he was making himself what he is at the very time he was painting, that the ensemble of his work is embodied in his life" (Sartre, 1947, pp. 50–51). For Sartre, the existence of the processes of authentic choice does not automatically confer moral worth on all choices made by all people in accordance with such procedures. In fact, although all moral acts must be chosen authentically, not all authentic acts are necessarily moral. Thus, the existential demand for authenticity, like the positivist separation between legality and morality, requires that the moral actor pay special attention to the moral content of any act that is to be judged. As there are no objectively valid criteria for judging moral worth in any universal manner, Sartre claims that each individual is required to make such a judgment on an individual basis and to commit himself or herself entirely to such judgments once they are made.

Thus, although the existentialist might respect the authentic Nazi for his honesty, in no way would the existentialist excuse himself from the moral responsibility of personally evaluating the specific normative content of the Nazi's beliefs. And if the existentialist chose to condemn such beliefs (as Radbruch claimed he did even at the time he was helping to legitimize them), he would then be committed to acting to oppose those beliefs regardless of the authenticity of those who held them or the procedural correctness of the legal forms by which those beliefs were being incorporated into the law. In a sense, existentialists and positivists bear an even greater obligation to commit themselves to the espousal of specific normative values than do the natural-law theorists in that they cannot escape such individual responsibility by an appeal either to legalistic formality or to ontological certainty.

As we have seen, positive-law theorists concede that people differ significantly in their views. Thus they recognize that the law must ultimately gain its legitimacy from its acceptance by the majority of the people and not because of its correspondence to some minority's criteria for absolute moral truth. By the same token, positive-law theorists tend to accept arguments in favor of laws protecting individual liberty such as those advanced by John

Stuart Mill (1859, pp. 180–190) in defense of his harm principle, which states that the liberty of an individual should not be restricted unless it can be shown that the individual has caused harm to others.

If we are not going to take a natural-law position (and obviously I do not choose to do so), then we cannot claim to be trying war criminals for their violations of universal moral laws that were legally unstated at the time of their acts. By the same token, however, most people do share a deep moral conviction that such acts cannot be allowed to go unpunished. Many would argue (and I would agree) that the perpetrators of the Holocaust or similar crimes simply cannot be allowed to go free on the basis of a legal technicality. Those who hold this view differ dramatically in their grounds for doing so.

THE LEGAL DILEMMA OF THE NUREMBERG TRIALS: THE SOVIET VERSUS THE AMERICAN MORAL APPROACH

Indeed, one of the legal problems that faced the United States in 1945 in regard to the Nuremberg trials stemmed from the fact that the Soviets' interpretation of the moral meaning of the trials differed significantly from the American view. The Soviets interpreted the trials in the context of a Marxist ideology that viewed the Nazi defeat as a victory of the progressive forces of socialism over those of a certain sort of capitalism. Despite this disagreement and many others (e.g., over competing notions of the "rights of the accused" and differing legal procedures), it was possible to hold and conclude these trials successfully because of the willingness on all sides to agree on the moral need for such trials without demanding that the moral grounds for this need be expressed in uniform terms. However, because these trials were held without the establishment of a legal basis for such trials before the Holocaust, the problem of the use of retroactive law remains starkly as a dilemma.

RESOLUTION OF THIS DILEMMA

In my view, the best possible solution to this dilemma is to adopt a suggestion made by Hart (1980) in his analysis of the case of a woman who had denounced her husband for violating a statute that made it an offense to make statements detrimental to the government of the Third Reich. The woman's husband was arrested on the basis of her charges and was sentenced to death. After the war, the woman was arrested and charged with violating an 1871 statute against "illegally depriving a person of his freedom." In 1949, the German courts upheld the woman's conviction on these charges even though she had clearly been acting in accordance with the laws in force at the time. The postwar German court dealt with this problem by simply stating that the Nazi statute "was contrary to the sound conscience and sense of justice of all decent human beings." This reasoning parallels the natural-law theorist's contention that the Nazi atrocities were illegal because they were "crimes against humanity" that violate our universal principles of moral worth. Here is how Hart (1980) resolved this question:

This reasoning was followed in many cases which have been hailed as a triumph of the doctrines of natural law and as signaling the overthrow of positivism. The unqualified satisfaction with this result seems to me to be hysteria. Many of us might applaud the objective—that of punishing a woman for an outrageously immoral act—but this was secured only by declaring a statute established since 1934 not to have the force of law, and at least the wisdom of this course must be doubted. (p. 80)

Hart went on to point out that there were only two other ways to deal with this dilemma. The first, obviously unacceptable and unconscionable, solution would have been to let the woman go unpunished. The other resolution was to use retroactive law with a full recognition of the implications of such an act. Hart states:

Odious as retroactive criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. . . . Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. (p. 80)

Here Hart demonstrates the positivist's willingness to face moral issues squarely and authentically rather than attempting to escape the responsibility for making moral judgments by hiding behind spurious legal claims concerning the validity of unstated yet binding laws. Thus, although on the one hand it is usually considered unfair to arrest someone for committing an act that was not technically illegal at the time it was committed, on the other hand, perhaps some situations are so extraordinary, so morally demanding of legal action, that they deserve to be treated as an exception and should be openly discussed as such. After all, American courts now allow individuals to sue corporations that engaged in activities resulting in long-term health disabilities for their employees or customers, even though those activities were not considered tortious at the time at which they took place (e.g., the diethylstilbestrol—DES—and the asbestos cases). Although such cases are obviously civil rather than criminal and are of less ethical magnitude than those under consideration here, the point remains that we already recognize that we may choose to ground the effective establishment of *ex post facto* law in our shared sense of moral concern or outrage. To the extent that such moral concern or outrage is truly shared by a majority of people, as I believe it is on the question of the Holocaust, it is within our power from a positivist position to recognize this fact consciously by passing and implementing laws that express that outrage even though such laws are admittedly passed after the fact.¹

CONCLUSION

Of course, we all pray that atrocities such as those perpetrated by the Nazis will not be repeated (though we have evidence that

many are still suffering in places such as South Africa, Iraq, and Kuwait). However, with our recognition that such events are always possible, we should work to ensure that the legal difficulties discussed in this chapter will not be encountered again. Recognition and honest acceptance of the past use of retroactive law in such cases lead us to clarify the fundamental issues involved in them, so that we will be enabled and obliged to deal with them authentically in the future. One important step in this direction would be to establish permanent mechanisms (such as those used at Nuremberg) that would empower an international tribunal to investigate, try, and even punish offenders in the event of a repetition of such crimes. Such a tribunal would not be a Platonic structure made up of wise philosopher-kings. It would instead be a judicial body established through the common consent of all participating nations, with appropriate checks and balances. The establishment of such a tribunal would require the international community to construct an apparatus for making the essential distinctions required.

This proposal has the added advantage of allowing diverse groups (e.g., democratic governments, Marxist governments, and Islamic governments) to agree on fundamental procedures while permitting them the flexibility to ground their moral claims in accordance with their differing cultural, religious, and ideological characteristics. The skeleton of an international legal structure of this sort already exists. All of the member countries of the United Nations are signatories of the 1948 United Nations Declaration of Universal Human Rights. Many of these same countries have also agreed to abide by an international treaty banning acts of genocide. If these same countries could agree to establish suitable jurisdiction in a permanent world court, such as that located at The Hague in the Netherlands, and if they would agree to abide by the decisions of such a court, then many of the legal problems we have discussed would be resolved. In addition, we would no longer have a situation in which one or two governments (e.g., the Soviet Union or Israel) could claim to possess a special prerogative in the matter of holding such trials. It would be more in accordance

with our standards of justice if such trials were held in international courts.

I recognize that numerous practical difficulties stand in the way of implementing these suggestions. The legal systems of other nations often operate in accordance with differing procedures and even under differing assumptions. For such an international court to be effective, it would be necessary for these differences to be resolved from the outset. Although such a resolution might require slow and painful international negotiations, the long-term results of such negotiations would be well worth the effort.

NOTES

1. For discussions of these issues, see Eckhardt (1987) and Rosenberg and Myers (1988).

REFERENCES

- Austin, John. (1855). *Lectures on Jurisprudence* (5th ed.), 2 vols. London. *Boston Globe*. (1987). March 4, p. 1.
- Eckhardt, A. Roy. (1987). *For Righteousness' Sake: Contemporary Moral Philosophies*. Bloomington and Indianapolis: Indiana University Press.
- Fuller, Lon. (1980). "Positivism and Fidelity to Law—A Reply to Professor Hart, the Problem of the Grudge Informer." In Joel Feinberg and Hyman Gross (Eds.), *Philosophy of Law* (2nd ed.), pp. 88–108. Belmont, CA: Wadsworth.
- Hart, H. L. A. (1980). "Positivism and the Separation of Law and Morals." In Joel Feinberg and Hyman Gross (Eds.), *Philosophy of Law* (2nd ed.), pp. 68–88. Belmont, CA: Wadsworth.
- Kelson, Hans. (1927). "Die Idee des Naturrechtes." *Zeitschrift für Öffentliches Recht*, 7, 221–228.
- Kennedy, John F. (1956). *Profiles in Courage*. New York: Harper & Brothers.
- Mill, John Stuart. (1859). "On Liberty." In Joel Feinberg and Hyman Gross (Eds.), *Philosophy of Law* (2nd ed.). Belmont, CA: Wadsworth.

- The New York Times*. (1989). December 30, p. 7.
- Radbruch, Gustav. (1973). *Rechtsphilosophie*. (Erik Wolf and Hans-Peter Schneider, Eds.). Stuttgart: K. F. Koehler Verlag.
- Rosenberg, Alan, and Myers, Gerald E. (Eds.). (1988). *Echoes from the Holocaust: Reflections on a Dark Time*. Philadelphia: Temple University Press.
- Sartre, Jean-Paul. (1947). *Existentialism*. (Bernard Frechtman, trans.). New York: Philosophical Library.
- Sartre, Jean-Paul. (1956). *Being and Nothingness*. (Hazel E. Barnes, trans.). New York: Washington Square Press.
- Spielvogel, Jackson J. (1988). *Hitler and Nazi Germany: A History*. Englewood Cliffs, NJ: Prentice-Hall.

OTHER PROBLEMS AND PROPOSED SOLUTIONS

Thou shalt not kill.

EXODUS 20:12-17

No freeman shall ever be debarred the use of arms.

THOMAS JEFFERSON (1743-1826)

The right of the people to keep and bear arms shall not be infringed.

U.S. CONSTITUTION, SECOND AMENDMENT (BILL OF RIGHTS)

The house of everyone is to him his castle and fortress, as well for his defense against injury and violence, as for his repose.

SIR EDWARD COKE (1552-1634)

I'm proud of the fact that I never invented weapons.

THOMAS A. EDISON (1847-1931)

Victims and Arms in Classical Legal Philosophy

STEPHEN P. HALBROOK, PH.D., J.D.

INTRODUCTION

The natural right of potential victims of crime to have a means of self-preservation (i.e., arms) has been critically analyzed by legal philosophers from the earliest times. Philosophical expositions of the concept of an armed populace surfaced in the republican vindication of defense against both crimes against humanity committed by oppressive governments and crimes against individuals perpetrated by private aggressors. However, philosophers in the authoritarian tradition have asserted that possession of weapons by private individuals encourages crime and sedition, and thus such philosophers have favored a state monopoly of the means of violence (Halbrook, 1984).

ANCIENT GRECIAN VIEWS ON ARMS POSSESSION

In Plato's *Republic* (1946), Socrates refutes Cephalus' proposal that justice be defined as fulfilling promises. Socrates declared: "Suppose, for example, a friend who had lent us a weapon were to go mad and then ask for it back, surely anyone would say we ought not to return it" (p. 20). Clearly, the possession of arms by sane individuals was ethically acceptable to Socrates.

By contrast, Plato advocated an absolutist political theory that was incompatible with the egalitarian democracy that an armed populace would inevitably instate. During war, Plato warned, oligarchies "have more to fear from the armed multitude than from the enemy" (p. 275). While seeking to establish democracy, the commoners become parent of the unruly child known as the tyrant, who will oppress his father "once he has disarmed him" (p. 295). In the ideal totalitarian state, according to Plato, the Guardians would employ arms as instruments of state policy, whereas the many would be disarmed and required to fulfill their proper functions (Plato, 1946, pp 125-129, 149).

Aristotle (1962) advocated a polity in which each citizen would legislate, bear arms, and work. Proposals that commoners be disarmed, according to Aristotle, would create imbalance and oppression: "But there are many things which Socrates left undetermined; are farmers and craftsmen to have no share in government. . . ? Are they or are they not to possess arms. . . ?" (p. 68). Accordingly, Aristotle protested against the philosopher Hippodamus' theory of the "Best State," in which only the class entrusted with defense of the state would be allowed to have arms. Aristotle exclaimed: "The farmers have no arms, the workers have neither land nor arms; this makes them virtually the servants of those who do possess arms" (p. 79). Decrying the "oligarchical devices" that encourage the rich to carry arms and discourage the poor from carrying them (p. 117), Aristotle similarly analyzed tyranny as involving "mistrust of the people; hence they deprive them of arms [and] ill-treat the lower class" (p. 218). In his history of Athenian constitutions, Aristotle (1952) noted that, under de-

mocracy, the people had been armed, but under the Thirty Tyrants the people had been disarmed to suppress opposition.

REPUBLIC OR EMPIRE: ROMAN THOUGHT ON PRIVATE ARMS POSSESSION

Caesar's crossing of the Rubicon symbolized the triumph in Rome of the standing army over the armed citizens. It was a violation of the law of republican Rome to bring an army near Rome.

Cicero's vindication (1975) of the right to have and use arms against both governmental tyranny and private aggression illustrates the philosophical premise of the republic. In defense of Gaius Rabirius, who was charged with taking up arms to kill the leader of an attempted coup, Cicero argued: "If you agree that the taking up of arms was lawful, then you are obliged to agree that the killing was lawful as well" (p. 279). Yet carrying weapons for purposes of assassination was criminal. As Cicero urged in his oration against Lucius Sergius Catilina, "You were illegally carrying arms. You had got together a group determined to strike down the leading men of the state" (Cicero, 1969, p. 83).

In his defense of Titus Annius Milo, Cicero (1969) most thoroughly justified "the swords we carry" to resist assault and robbery:

If our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. . . . Indeed, even the wisdom of the law itself, by a sort of tacit implication, permits self-defense, because it does not actually forbid men to kill; what it does, instead, is forbid the bearing of a weapon with the intention to kill. (p. 222)

The republican philosophy of Rome was well summarized by Edward Gibbon (1776) as follows: "A martial nobility and stubborn

commons, possessed of arms, tenacious of property, and collected into constitutional assemblies, form the only balance capable of preserving a free constitution against enterprises of an aspiring prince" (Vol. 1, p. 53).

Even after the death of the ancient Roman republic, the individual right to self-defense with arms continued to be recognized in Roman law: "Cassius says that one can repel force with force; for this right is conferred by the Law of Nature. Hence he holds that it is clear that armed aggression can be repelled by arms" (Scott, 1973, Vol. 9, p. 311). However, the emperors Valentinian and Valens, who were known for their oppression and cruelty, decreed: "No one shall, hereafter, without our knowledge and consent, have the right to bear arms of any description whatever" (Scott, 1973, Vol. 15, p. 200). The growth of the empire and the resulting loss of liberty were reflected in the edict that, while promising the abolition of violent crime, required all arms to be deposited in "Our Imperial arsenal" and forbade the private sale of arms of all kinds (Scott, 1973, Vol. 16, pp. 314-316).

MACHIAVELLIAN REALISM

The Roman experience was the inspiration for Machiavelli's contention (1970) that an armed populace has *virtu* whereas a disarmed people is subject to *fortuna*. Whereas the Romans and the Swiss were "well armed and enjoy great freedom" (Machiavelli, 1952, p. 73), in Venice and France the rulers, after "depriving the people of arms," despoiled the populace (Machiavelli, 1970, p. 373). An armed people with civic virtue would not occasion tumults, "for men who are well disciplined will always be as cautious of violating the laws when they have arms in their hands as when they have not" (Machiavelli, 1965, p. 40). Machiavelli (1965) urged that "all the youth in the country" should be accustomed to the bow and the then newly developed firearm (p. 59). Always the supreme realist, Machiavelli understood that ultimately only an armed populace could protect itself from tyranny.

BODIN'S ABSOLUTISM

Whereas Aristotle, Cicero, and Machiavelli had advocated the right of potential victims to have arms for defense against attack by private and public criminals alike, Jean Bodin revived the absolutist tradition of Plato and advocated the disarmament of commoners. Bodin (1606) claimed that such disarmament not only prevented democratic sedition but also reduced violence between private parties. No punishment is too severe to promote the monarch's total control of arms:

But so sometimes things fall out, as that the law may be good, just and reasonable, and yet the prince to be no way subject or bound thereto: as if he should forbid all his subjects, except his guard and garrison soldiers, upon pain of death to carry weapons, so to take away the fears of murders and seditions; he in this case ought not to be subject to his own law, but to the contrary, to be well armed for the defense of the good, and punishment of the evil. (p. 106)

Bodin dwelt on the means for preventing commoners from wresting any political control from the absolute monarch:

Another and the most visual way to prevent sedition is to take away the subjects' arms: howbeit that the princes of Italy and of the East cannot endure that they should at all have arms; as do the people of the North and the West. (p. 542)

The practice of wearing a sword in peacetime,

which by our laws, as also by the manners and customs of the Germans and Englishmen is not only lawful; but by the laws and decrees of the Swiss even necessarily commended: the cause of an infinite number of murders, he which weareth a sword, a dagger, or a pistol. (p. 542)

The examples chosen by Bodin to illustrate the desirability of absolute weapons' bans—Egypt, Crete, and Turkey—are reveal-

ing, for in each of these countries, the disarmed populaces were subjected to slavery or genocide at the hands of armed tyrants. Equally revealing are the classes that Bodin singled out as prone to crime if armed. Thus, "it must not be allowed for all other subjects to carry arms, least the laborer and handicrafts man should take delight in thieving and robbing" (p. 614). The disarming of carmen and porters in Paris allegedly prevented "a thousand murders and stabbings" and allegedly prevented the raising of "seditions and broils" (p. 542). No wise politician would "expect until the murder be committed, or that the sedition be raised, before he forbid the bearing of arms" (p. 542).

Yet Bodin conceded that prudent people may carry arms to prevent crime, by referring to "men that travel unarmed, they encourage thieves to kill them, to have their spoils" (p. 599). But he also wrote, "For we may not think ever to keep that people in subjection which hath always lived in liberty, if they be not disarmed" (p. 615). Similarly, Bodin was well aware that laws to disarm the populace functioned more to promote domination than to prevent crime: "Now this fear that Cities and Commonweales had of their slaves, was the cause that they never durst suffer them to bear arms . . . and that upon pain of death" (p. 38).

Besides an armed populace, "the immoderate liberty of speech given to orators" was identified by Bodin as a cause of sedition and rebellion. "Wherefore a knife is not more dangerous in the hand of a mad man, than eloquence in the mouth of a mutinous Orator" (p. 544). For Bodin, prior restraint must be applied to speech and arms alike in order to maintain the status quo.

HOBBS, LOCKE, AND SIDNEY

Although finding quite attractive the French absolutist's opposition to free speech and support for an all powerful monarch,

Thomas Hobbes (1964) nonetheless failed to suggest any connection between commoners, crime, and weapons. Instead, for Hobbes, the "summe of the Right of Nature" is: "By all means we can, to defend our selves" (p. 88). "A man cannot lay down the right to resisting them, that assault him by force, to take away his life" (p. 89). In short, the individual never actually allows the state to enjoy a complete monopoly of coercion: "when taking a journey, he arms himself . . . and this when he knows there be Laws, and publike Officers, armed, to revenge all injuries shall be done to him" (p. 85).

The seventeenth-century absolutist theories advanced by Bodin and Hobbes were attacked by John Locke and Algernon Sidney, who saw an armed populace as necessary to sustain rightful revolution against governmental usurpation. The right of potential victims to resist attack, and hence to have the means to do so, follows from Locke's proposition (1955) that it is "reasonable and just that I should have a right to destroy that which threatens me with destruction" (p. 14). Although "force is to be opposed to nothing but to unjust and unlawful force" (p. 170), one may kill an aggressor where there is insufficient time to appeal to law, because "the law could not restore life to my dead carcass" (p. 173). Absolute power is not granted to the legislator, as though the people "have disarmed themselves, and armed him, to make prey of them when he pleases" (p. 114). Tyrants, according to Locke, may be resisted in the same manner and for identical reasons as robbers or pirates.

Algernon Sidney (1698), Locke's fellow republican, attacked the legal systems that Bodin had advanced as paragons of desirable arms prohibition laws. Against the absolutist principle that subjects must not disobey any governmental commands, Sidney posed as counterexamples the genocidal slaughter of Christians by Turkish authorities and the fact that "the King of *France* may when he pleases, arm one part of his Protestant Subjects to the destruction of the other" (p. 347). In the ideal commonwealth, "the body of the People is the public defense, and every man is armed and disciplined" (p. 157).

MONTESQUIEU AND BECCARIA

In the century after Locke and Sidney had countered Bodin's political arguments for a disarmed populace, penal reformists attacked the criminological theory that the possession of arms by commoners increased the murder rate. In particular, Montesquieu and Beccaria ridiculed laws that punished the mere defensive bearing of arms without any aggressive intent.

Montesquieu (1899) noted the following interconnected facts concerning Paraguay, a country reputed to be an authoritarian society: "The Indians of Paraguay do not depend on any particular lord; they pay only a fifth of the taxes, and are allowed the use of firearms to defend themselves" (Vol. 1, p. 36). Referring to "the natural right of self-defence," Montesquieu exclaimed, "Who does not see that self-defence is a duty superior to every precept?" (Vol. 2, p. 64). Moreover, Montesquieu attacked Plato's proscription of the use of arms by slaves: "If a slave, says Plato, defends himself, and kills a freeman, he ought to be treated as a parricide. This is a civil law which punishes self-defense, though dictated by nature" (Vol. 2, p. 59).

Criminal laws which interfered with self-defense by punishing harmless conduct would be doubly unreasonable, according to Montesquieu: "It is unreasonable . . . to oblige a man not to attempt the defense of his own life" (Vol. 2, p. 60). It is the misuse of arms for aggressive violence, rather than the use of arms in self-defense, that the law should punish: "Hence it follows, that the laws of an Italian republic [Venice], where bearing fire-arms is punished as a capital crime and where it is not more fatal to make an ill use of them than to carry them, it is not agreeable to the nature of things" (Vol. 2, pp. 79-80).

Influenced in part by Montesquieu, Cesare Beccaria initiated the modern movement for reform of the criminal laws with the publication of *On Crimes and Punishments* in 1764. Applying utilitarian standards to renounce torture and the death penalty, and at the same time supporting appropriate punishment for crimes against property and especially against the person, Beccaria earned the reputation of being the father of penal reform. Of such

laws as those condemned by Montesquieu, providing the death penalty for mere possession of a firearm, Beccaria wrote:

The laws that forbid the carrying of arms . . . disarm those only who are neither inclined nor determined to commit crimes. . . . Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. (Beccaria, 1963, pp. 87–88)

For Beccaria, it was unreasonable to punish a person for the mere possession of an inanimate object, particularly a weapon that the law-abiding individual could use for self-defense. One who would disobey laws against murder would surely disobey laws against carrying arms and could plunder and murder more easily when victims obeyed these proscriptions. Laws against carrying arms historically developed and flourished in the dark ages of penology, along with the rack and the screw, whereas protection of personal liberty and an enlightened approach to crime and punishment necessitated recognition of the potential victim's right to keep and bear arms.

Beccaria strongly influenced John Adams and Thomas Jefferson, the latter of whom found the above quotation on the carrying of arms to be significant. Jefferson proposed that, under an ideal constitution, "no freeman shall ever be debarred the use of arms" (Halbrook, 1989, p. 52). Similarly, the framers of the federal Bill of Rights, determined to prevent both governmental and private oppression (Levinson, 1989), provided in the Second Amendment that "the right of the people to keep and bear arms, shall not be infringed."

CONCLUSION

In summary, legal philosophers in the classical liberal or republican tradition supported the right of commoners to have

arms to prevent their victimization by both oppressive governments and private aggressors alike. Aristotle, Cicero, Machiavelli, Locke, and Sidney stressed the political virtues of an armed, and hence sovereign, citizenry capable of protecting itself against the ravages of tyranny. Similarly, Cicero, Montesquieu, and Beccaria emphasized the utility of the possession of weapons by law-abiding individuals for protection against assault and homicide. By contrast, legal philosophers in the absolutist or authoritarian tradition advocated a state monopoly of arms to prevent sedition and crime. Plato, Hippodamus, Roman statist, and Bodin contended that a strong state required the disarming of the lower classes and that violent crimes committed by commoners would be prevented by harsh penalties for the mere possession of weapons.

Responses to the query of whether prospective victims of crime and genocide have a right to be armed for their defense reflect broad philosophical assumptions about the nature of the individual and the state. Resolution of this issue ultimately requires a critical analysis of the fundamental jurisprudential and political postures of individualism and statism. Any approach seriously oriented toward the interests of the victims of violent crime must take due account of the classical liberal vindication of the victim's right to have the means of prevention and resistance.

REFERENCES

- Aristotle. (1952). *Athenian Constitution*. (H. Rackham, trans.). Cambridge: Harvard University.
- Aristotle. (1962). *The Politics*. (T. A. Sinclair, trans.). Baltimore: Penguin.
- Beccaria, C. (1963). *On Crimes and Punishments*. (H. Paolucci, trans.). Indianapolis: Bobbs-Merrill.
- Bodin, J. (1606). *The Six Bookes of a Commonweale*. (R. Knolles, trans.). London: G. Bishop.
- Cicero. (1969). *Selected Political Speeches*. (M. Grant, trans.). Baltimore: Penguin.

- Cicero. (1975). *Murder Trials*. (M. Grant, trans.). Baltimore: Penguin.
- Gibbon, E. (1776). *The Decline and Fall of the Roman Empire*. New York: The Modern Library.
- Halbrook, S. (1984). *That Every Man Be Armed: The Evolution of a Constitutional Right*. Albuquerque: University of New Mexico Press.
- Halbrook, S. (1989). *A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees*. New York: Greenwood Press.
- Hobbes, T. (1964). *Leviathan*. New York: Washington Square Press.
- Levinson, S. (1989). "The Embarrassing Second Amendment." *Yale Law Journal*, 99, 635.
- Locke, J. (1955). *Of Civil Government*. Chicago: Henry Regnery.
- Machiavelli, N. (1952). *The Prince*. (L. Ricci, trans.). New York: New American Library.
- Machiavelli, N. (1965). *The Art of War*. (E. Farnsworth, trans.). Indianapolis: Bobbs-Merrill.
- Machiavelli, N. (1970). *Discourses*. (L. Walker, trans.). New York: Penguin.
- Montesquieu, C. (1899). *The Spirit of the Laws*. (T. Nugent, trans.). New York: Colonial Press.
- Plato. (1946). *The Republic*. (E. M. Cornford, trans.). New York: Oxford University Press.
- Scott, S. (Trans.). (1973). *The Civil Law*. New York: MS Press.
- Sidney, A. (1698). *Discourses Concerning Government*. London.

Is Gun Control Legislation a Solution for Protecting Victims?

JOSEPH G. GRASSI, PH.D.

BACKGROUND: CAUSES OF VIOLENT CRIME IN AMERICA

We are living in an age in which there is a record national crime rate, and acts of random violence are so commonplace that violence is now considered as American as apple pie. It is an age in which one of every four households is touched by violent crime. It is an age in which, according to Kenneth Lipper (1989), "Women and children in Harlem and Bed-Stuy are shut-ins behind barred windows and locked doors, afraid of the streets and hallways that neighborhood junkies, dealers, prostitutes and pimps have captured as their own territory" (p. 28). It is an age in which we hesitate to use subways because of the increase in violent crime. It is an age in which coexistence with fear is a way of life. It is an age in which, according to 1987 federal statistics, 3,236,200 burglaries were committed, averaging one every ninety-seven seconds (*Source Book of Criminal Justice*, 1988). It is an age of terrorism on both a national and an international level. It is an age in which

there is a desperate need for drugs that leads to violent crimes (Lipper, 1989, p. 46). In short, we are living in a violent age.

How can crimes of violence be curbed? Can gun control legislation come to the aid of crime victims? Neither gun control legislation nor the arming of citizens can eliminate drugs and ever-increasing crimes of violence. A real "reduction in criminal violence will come only when economic, political, social, and cultural changes greatly reduce" the need for violent crimes (Kates, 1981, p. 138). Joseph E. Lowery (1990) confirms that criminal violence will be reduced only when "economic, political, educational, and moral institutions lead the way."

The economic picture today is one of unemployment, poverty, countless bankruptcies, and low productivity. The unemployment picture not only is bleak but also leads to a crippling of the human person. Loss of employment leads to emotional and serious mental health disorders and to increased suicide rates. Poverty and unemployment and homelessness crush the human spirit and render the victim ever more vulnerable to an animal level of existence. George Bernard Shaw (1907) said that poverty is "The greatest of evils and the worst of crimes" (p. 305).

In the American family today, we are witnessing an increasing incidence of battered wives and abused children. Crimes against private property and crimes of violence are strongly linked to unemployment and poverty. As businesses fail and production decreases in important industries, such as the automotive and building industries, more people swell the ranks of the unemployed, and the incidence of crime increases. The aged are preyed upon, being robbed and even killed by individuals who need money for food or drugs. "Drug related crimes are threatening the city" (Lipper, 1989, p. 46). This picture needs to be changed radically, and government must play an important role in the economic activity of its citizens. It must become actively involved to solve these problems.

If this task is to be accomplished, the political picture must change; otherwise proper legislation to alleviate the situation has little chance of being enacted. Congress has passed an ethics bill

that may well help to improve the moral and ethical character of Congress. But more must be done to curb the greed of Congress as exemplified by the recent troubles of Congressmen James Wright, Tony Coelho, Mario Biaggi, and Robert Garcia. The deleterious effects of the lobbyists' money (i.e., the money of the political action committees, or PACs) on the Congress have to stop. It is time for Congress to reexamine its commitment to the people and the nation. Laws must be made that do not unfairly favor one class over another. Taxes ought to be imposed justly and equitably. All need to pay their fair share, but each should be assessed according to his or her ability to pay.

The National Commission on Civil Disorders (Wicker, 1968, p. 205) found that violence results from the frustrations of being powerless. As long as a class of people feels that it has no opportunity and as long as another class is in permanent control, violence will continue. As John F. Kennedy (1962) said, "Unless a peaceful revolution is possible, a violent revolution will occur" (p. 891), and his words seem most prophetic today. But achieving economic, political, social, and cultural improvement is a long and difficult road. The task of getting politicians and citizens to reexamine the economic structure from the viewpoint of the common person, the task of changing the political atmosphere from one of distrust of politicians to one of faith and confidence, the task of promoting a society in which the social welfare of the citizens is of utmost importance—all this is work that requires a basic reformation of everyone's character and hence can occur only gradually. While we make this journey, there is a need to take some measures to reduce violence.

HANDGUN HOMICIDES

One of the ways to tackle the crime problem is by means of gun control legislation. At present, handguns account for half of all murders. Former Chief Justice Warren E. Burger (1990) pointed out that "in 1988 there were 9,000 handgun murders in America.

In Washington, D.C., there were more than 400 homicides" (p. 4). Richard Lacayo in *Time* magazine (1990) reported that there are 70 million gun owners in the United States (p. 16). Why is there a need for a gun? The obvious answer has already been pointed out. Fear has gripped our cities, and our citizens are so helpless that they find a sense of security and peace only when they possess a gun. But guns are no solution. The proliferation of guns leads to their use, which increases crimes of violence.

A *New York Times* editorial (1990) cogently pointed out that "Violent crime is more violent today because more street criminals carry bigger guns. The most popular is the 9-millimeter semi-automatic pistol. . . . New York City homicides committed with a gun soared from 19 percent in 1960 to 68 percent last year" (p. 14).

In comparison with other countries, the United States has the highest rate of handgun homicides. In 1989, the United States had 9,536 homicides. In startling contrast only 8 persons in Britain and 5 persons in Canada were killed that year (Handgun Control Inc., 1989).

More telling is the study reported by Sloan *et al.* (1988), published in the *New England Journal of Medicine*, of the cities of Seattle, Washington, and Vancouver, British Columbia. The study found: The rate of assaults involving firearms was seven times higher in Seattle than in Vancouver. . . . Our analysis of the rates of homicide in these two largely similar cities suggests that the modest restriction of citizens' access to firearms (especially handguns) is associated with lower rates of homicide. The study concludes that "restricting access to handguns may decrease national homicide rates."

The study has been criticized by James D. Wright (1989), who maintains that there are other variables that have not been considered, such as poverty and drug or alcohol abuse. These variables do raise some questions, but the fact remains that crimes with guns are much more frequent in United States cities.

The question of gun control evokes strong reactions both pro and con. Those opposed to gun control argue that such legislation violates people's freedom and their right to possess firearms to

protect their property and their lives. Whenever any legislation is passed, a certain amount of freedom is necessarily lost. But the question to be considered is whether the freedom lost is more significant than the good gained? At the present time, when violent crime is so rampant that nearly every day the newspapers devote individual articles and series of articles to crime, we need to look seriously at the value of gun control legislation. As mentioned earlier, gun control legislation is not the ultimate answer to our crime problems. Although it is simply a partial answer and may be only a temporary solution to a serious problem, it represents a strong beginning.

GUN CONTROL LEGISLATION VERSUS FREEDOM TO CHOOSE

Those who oppose gun control legislation—for example, the National Rifle Association—do so not only because they fear the loss of freedom but also because they view any and all law as naturally restrictive, and because they fear that their lives and property are at the mercy of armed criminals. They view gun control laws negatively, that is, as forbidding them to do something or as forcing them to do something distasteful, for example, registering guns. Such laws are seldom viewed positively, that is, as a means of enhancing our lives.

The true goal of good laws, however, is promoting and protecting our well-being, not restricting our freedom. Because all law is inherently restrictive, we ought to consider seriously whether the positive values of a proposed law outweigh the loss of the freedoms it would curtail. Although one should not give up any freedom too willingly, one also should not insist on holding onto every freedom at any price.

It is important that we look at freedom closely. Most of us would agree that freedom manifests itself mainly through choices. We would all agree that freedom is a priceless good. It is what distinguishes us from a different class of living things. A serious

and difficult question arises when we ask whether freedom and choice are the same. They are not the same. Freedom is necessary, whereas choice flows from our being free. If freedom is a priceless good, then it ought to promote our well-being and enhance our life. But often our choices go counter to our well-being. We need to know when choices are beneficial and when harmful. The attainment of this knowledge is, of course, difficult. The goal of knowledge is the enrichment of our lives. The more knowledge one possesses, the freer one is, yet one's choices may, as a result, be severely restricted. As Socrates pointedly put it, to know the good is to do the good (Diogenes Laertius, 1972, p. 31).

An example that all of us can appreciate is the effect of cigarette smoking on our health. As more adults have come to realize the dangers to health caused by smoking, an ever-increasing number of adults are breaking the smoking habit. Of what value is knowledge if it does not direct our actions? Knowledge or truth, the fruit of knowledge, compels internally and thus makes us free.

GUN CONTROL LAWS AND VIOLENT CRIME

Another objection to gun control legislation is that criminals will always be able to get their hands on a gun. This objection misses completely the goal of legislation. Diehard criminals will always obtain guns. Law is intended to promote the common good of the citizens. There are only two classes of people on whom the law has no effect: the "good" and the "evil" classes. But these two classes comprise at most 20 percent of the population. A person who is "good" has no need of a law; a person who is "evil" and determined to be that way will not be curbed by any law, except when she or he is apprehended. It is the remaining 80 percent of the population who can be swayed either toward good or toward evil that require good laws. Laws that are reasonable and likely to promote the well-being of society will be an effective force in directing these people to become good citizens. This force can thus be seen as a positive force for good. When, eventually, some

90 percent of the population obey the laws, the possibility of decreasing the crime rate will become a reality. Often crime victims are hurt by those who ordinarily would commit no crimes and who, at other times, would possess no guns. In addition, many who are committing crimes are first offenders who have serious problems. By means of some form of legislation (banning of Saturday night handgun specials and large-magazine and semi-automatic weapons, which are not used by hunters), a number of potential offenders would be deterred.

It appears that the resistance to gun-control legislation is diminishing. *Time* magazine reported that "the advocates of gun control had triumphed in a surprisingly lop-sided 239-186 House vote for the so-called Brady Bill," H.R. 7 (Prud'homme, 1991, p. 26). Prior to the voting, the House had rejected a National Rifle Association (NRA)-backed counterproposal. This action by the House "represents a significant symbolic victory for gun-control for us and shows that legislators are responding to the public's concerns about crime" (Prud'homme, 1991, p. 26).

CONCLUSION

Although I propose the need for some gun control legislation, let us remember that the causes of crime cannot be removed merely by the passing of laws. We need to change the economic, political, social, and cultural conditions that lead to crime. We need to change the helplessness of classes of people who are victims of the system. The crime victim and the criminal are the products of a socioeconomic system that ignores the plight of people.

REFERENCES

- Burger, Warren E. (1990). "The Right to Bear Arms." *Parade: The Sunday Newspaper Magazine*, January, 14, pp. 4-6.

- Diogenes Laertius. (1972). *Lives of Eminent Philosophers*, Vol. 1. Cambridge: Loeb Classics, Harvard University Press.
- Handgun Control Inc. (1989). *Poster*. Washington, DC.
- Kates, Don B. (1981). "Why Gun Control Won't Work." *Commonweal*, March 13, 108.
- Kennedy, John F. (1980). "Address to Latin American Diplomats, March 12, 1962." In Emily Morrison Beck (Ed.), *Familiar Quotations of John Bartlett* (15th ed.).
- Lacayo, Richard (1990). "Under Fire." *Time*, January 29, pp. 16-23.
- Lipper, Kenneth (1989). "What Needs to Be Done." *The New York Times Magazine*, December 31, Section 6, 139:28, 45-46.
- Lowery, Joseph E. (1990). Martin Luther King Lecture at Fairfield University, January 18.
- New York Times*. (1990). Editorial, August 13.
- Prud'homme, Alex. (1991). "A Blow to the NRA." *Time*, May 20, p. 26.
- Shaw, George Bernard (1907). "Preface to *Major Barbara*." In *The Complete Plays, with Prefaces*, Vol 1. New York: Dodd Mead, 1962.
- Sloan, John H.; Kellermann, A. L.; Reay, D. T.; Ferrer, J. A.; Hoepsell, T.; Rivara, F. P.; Rice, C.; Gray, L.; and Gerfu, J. (1988). "Handgun Regulation, Crimes, Assaults, and Homicides." *New England Journal of Medicine*, 319(19), November 10, pp. 1256-1262.
- Source Book of Criminal Justice*. (1988). U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. Washington, DC: US Government Printing Office.
- Wicker, Tom. (1968). *U.S. Kerner Commission: Report of the National Advisory Commission on Civil Disorders*, New York Times Edition. New York: Dutton.
- Wright, James D. (1989, July). "Guns and Sputter." *Reason*, 21(3): 46-47.

Why Retributivists Should Care about Deterrence

DOUGLAS N. HUSAK, PH.D., J.D.

INTRODUCTION

An overwhelming majority of the public solidly supports more severe punishments for violent crime. This sentiment culminates in a demand for restoration of the death penalty in states that have abolished it, and for more frequent use of the death penalty in states that have retained it. Difficulties in establishing an empirical connection between stiffer punishments in general (and capital punishment in particular) and a decrease in violent crime are well known and need not be rehearsed here (Bedau, 1987). A more important project from the philosophical point of view is to assess whether the supposition that harsher punishments reduce violent crime supports the judgment that such punishments are justified. In this chapter, I argue that, although retributivists should be somewhat concerned about deterrence, very severe punishments cannot be defended as safeguards for the future victims of crime. In order to uphold this conclusion, some preliminary observations about the justification of punishment are in order.

CRUELTY AND THE JUSTIFICATION OF PUNISHMENT

Few philosophical controversies are characterized by such radical disagreement as debates about the justification of punishment. One school of thought attaches dispositive significance to a factor that a competing tradition dismisses as entirely irrelevant. Bentham (1982) and his consequentialist followers maintain that all normative questions about punishment are capable of empirical resolution. If the consequences of imposing more severe punishments are preferable to the consequences of alternatives, then more severe punishments are justified. Kant (1965) and his retributivist disciples insist that consequences are totally unimportant, and that justificatory issues should be resolved exclusively by reference to the desert of the offender.

The polarity of these opposed traditions has been extended into the twentieth century. The most influential and celebrated attempt to synthesize these divergent schools has been undertaken by H. L. A. Hart (1968). He begins his "Prolegomenon to the Principles of Punishment" with the "suspicion that the view that there is just one supreme value or objective (e.g., Deterrence, Retribution or Reform) in terms of which *all* questions about the justification of punishment are to be answered, is somehow wrong" (p. 2). Yet to describe Hart's view as a "synthesis" is potentially misleading. For he cautions that

what is most needed is *not* the simple admission that instead of a single value or aim (Deterrence, Retribution, Reform or any other) a plurality of different values and aims should be given as a conjunctive answer to some *single* question concerning the justification of punishment. What is needed is the realization that different principles (each of which may in a sense be called a "justification") are relevant at different points in any morally acceptable account of punishment. (p. 3)

Even this alleged synthesis of traditions sharply distinguishes the context in which considerations of deterrence are appropri-

ate from the context in which appeals should be made to retribution.

As a result of Hart's insight, it has become conventional philosophical wisdom to distinguish questions about the general justifying aim of punishment from questions about whether specific kinds of punishments are warranted in particular cases. Few contemporary legal philosophers assess the justifiability of a particular punishment largely (or even partly) by reference to its efficacy as a deterrent. Suppose that the commission of a given crime x has reached epidemic proportions, or that the severity of punishment inflicted on persons convicted of crime x has proved insufficient to deter prospective offenders. These facts have no obvious bearing on the *desert* of a criminal about to be sentenced for having committed crime x (Von Hirsch, 1986). Under such circumstances, there is a temptation to "make an example" of this unfortunate criminal, in order to "send a message" to persons who might be contemplating crime x . However, the retributive principle that offenders should be punished in accordance with their deserts weighs heavily against succumbing to this temptation.¹ A preoccupation with deterrence seemingly permits not only punishments disproportionate to the gravity of offenses, but also monstrosities such as collective and vicarious punishments (McCloskey, 1965).

Thus the dominant tendency among most contemporary legal philosophers is to approach questions about the severity of punishment within the framework of a retributive theory, and to favor whatever amounts of punishment are *deserved*.² Hence they tend to regard the controversy about whether and to what extent a punishment deters as totally irrelevant to its justification. Later I will argue that this view requires a major qualification. But if this "dominant tendency" is sound, it is clear that more severe punishments cannot be defended as safeguards for the future victims of crime.

Can stiffer punishments such as the death penalty be upheld on retributive grounds? To be sure, it is notoriously difficult to decide whether a particular punishment is deserved by a given offender. Retributivists have not been especially impressive in

their attempts to correlate the severity of a punishment with the gravity of an offense. Despite these problems, the different opinions among contemporary legal philosophers about whether a quantum of punishment is justified for a given crime can be interpreted as a disagreement about whether persons who commit that crime deserve that quantum of punishment. In the absence of a satisfactory theory of desert, how should such controversies be resolved?

The inability to answer this question renders the imposition of *all* forms of punishment problematic, and the problem becomes most acute as punishments increase in severity. Disagreement becomes especially vehement when capital punishment is considered. Does a person who commits whatever offense(s) society deems to be the most serious ever *deserve* the death penalty (Nathanson, 1987)? Some guidance in answering this exceedingly difficult question is provided by the moral sentiment embodied in the Eighth Amendment proscription of cruel and unusual punishments.

Authorities are unclear about the significance of the word *unusual* in applying the Eighth Amendment. According to a literal interpretation, which emphasizes the conjunction *and*, a cruel punishment is permitted as long as it is not unusual. It is not surprising that this interpretation has been rejected. In one of the few comments about this word by the Supreme Court, Chief Justice Warren indicated:

Whether the word "unusual" has any qualitative meaning different from "cruel" is not clear . . . [P]recise distinctions between cruelty and unusualness do not seem to have been drawn [citations of cases omitted]. These cases indicate that the Court merely examines the particular punishment involved in light of the basic prohibition against inhuman treatment without regard to any subtleties of meaning that might be latent in the word "unusual." (*Trop v. Dulles*, 1958, pp. 100-101, note 32)

One commentator remarked that "'unusual' is probably best thought of as adverbially modifying 'cruel'" (Anonymous Note,

1966). I will suppose these observations to be accurate. It is unthinkable that a state could persuade the U.S. Supreme Court of the constitutionality of a cruel punishment simply by imposing it frequently.

Thus substantive debate about the scope of the Eighth Amendment should focus entirely on the concept of cruelty. I begin this debate with the (admittedly controversial) assumption that all parties should agree that no civilized legal system should impose punishments that are cruel. If so, those who favor capital punishment must be prepared to argue against its cruelty. Presumably the link between the concepts of *cruelty* and *desert* is established by the principle that no offender, regardless of how despicable, deserves to be treated cruelly. Criminals might exhibit cruelty toward their victims, but the state must refrain from cruelty in its choice of punishments. Both legally and morally, I will suppose that the judgment that a punishment is cruel entails that it is not deserved, and therefore that it is unjustified.

It might be suspected that appeals to the notion of cruelty do not advance the inquiry very far and merely serve to rephrase the old issue under a new description. For how can it be decided whether a given punishment is cruel? There are examples of punishments—for example, those involving torture—that nearly everyone would agree to be cruel. But relatively painless impositions of the death penalty constitute troublesome “borderline cases” on which reasonable minds can (and do) differ.³ What is needed is a comprehensive analysis of the concept of *cruelty*, so that impositions of the death penalty can be shown to fall on one side of the line or the other. In what follows I propose only a small part of such an analysis. I use certain features of this (incomplete) analysis to challenge the foregoing “dominant tendency” I have attributed to “most contemporary legal philosophers” by suggesting a somewhat more radical synthesis of the deterrence and retributive traditions than that proposed by Hart. I believe that questions about deterrence are of limited relevance in determining what severity of punishment is undeserved and therefore unjustified.

I do not argue that this “more radical synthesis” applies to *all*

kinds of punishments; rather, I argue that it pertains only to those kinds of punishments (e.g., the death penalty) that lie on the borderline between cruelty and noncruelty. I suggest that the issue of whether such punishments deter is important in assessing their cruelty. My general strategy is first to introduce a tentative hypothesis purporting to establish a connection between the question of whether severe punishments are cruel and the issue of whether they deter. If the determination of the cruelty of capital punishment depends in part on its efficacy as a deterrent, it may be impossible to conclude (in the absence of better empirical evidence) that the death penalty is cruel. In the second part of this chapter I use this hypothesis to attempt to make sense of some (otherwise mysterious) aspects of recent Supreme Court interpretations of the Eighth Amendment. This latter attempt is not entirely successful, and it is doubtful that the argument in the first part of this chapter will prove especially useful to those who hope to support the reasoning of the Court that concludes that some statutory schemes imposing the death penalty conform to the Eighth Amendment.

The tentative hypothesis purporting to establish the connection between cruelty and deterrence is simply stated. One reason to believe that some inflictions of suffering are cruel is that they are unnecessary, as they are not designed to serve a useful social purpose. This hypothesis is supported by the close association in ordinary language between inflictions of suffering that are cruel and those that are wanton, senseless, or gratuitous. Consider nonpunitive situations—for example, wartime—in which killings are frequent.⁴ In those cases in which the more obvious criteria of cruelty (e.g., excessive pain and suffering) are not satisfied, those killings are singled out as especially cruel that are pointless in the context of the war effort. Killing civilians, for example, seems a good deal more cruel than killing enemy soldiers. The greater cruelty does not derive exclusively from the fact that civilians are more likely to be innocent than combatants, and hence less deserving of death. More significantly, the cruelty stems at least partially from the fact that the killing of civilians is less likely to promote

strategic military objectives than the killing of soldiers. Notice that the killing of a civilian, although more cruel, need involve no greater amounts of pain and suffering than the killing of a combatant. Hence such examples demonstrate the inadequacy of the naive view according to which the cruelty of treatment is assessed exclusively by reference to the subjective experiences of the victim. Although such subjective experiences are relevant, the intention or motivation of the agent who inflicts the suffering is also important to the determination of whether he or she acted cruelly.⁵ If the agent's behavior aimed at no socially useful purpose, then he or she acted more cruelly than if he or she had pursued a socially useful end.

Considerable difficulty might be anticipated in applying this tentative hypothesis to assess whether inflictions of suffering are cruel, for there is bound to be disagreement about what objectives are socially useful. Fortunately, however, this general difficulty is of little or no concern in the context of discussions of severe punishments. Although retributivists insist that the *justification* of impositions of punishment consists of some factor other than their tendency to deter, they do not question the social *usefulness* of deterrence as an important and valuable side effect of punishment (Mabbott, 1939). Hence, according to this tentative hypothesis, the issue of whether and to what extent capital punishment deters prospective offenders is relevant in assessing its cruelty and is therefore of interest even to retributivists. If the empirical evidence supports the conclusion that the death penalty does *not* deter, legislators have a good legal *and* moral reason to exclude capital punishment from the criminal practice of their jurisdiction. If, however, the empirical evidence *supports* the case for deterrence, legislators cannot condemn capital punishment on the ground that it is useless and therefore cruel. If the death penalty should be denounced as cruel despite its tendency to deter, new arguments in support of this denunciation are required.

Is this tentative hypothesis true? In proposing it as tentative, I intend to indicate my misgivings. There are several possible difficulties here; I will mention only one. I have suggested that a

severe punishment might be cruel if it serves no socially useful purpose, and that it serves no such purpose if it fails to deter more effectively than less severe alternatives. But perhaps there are other socially valuable objectives of a punishment apart from deterrence (Feinberg, 1970). If so, the pursuit of these ends *might* justify the infliction of that punishment. However, I will not explore this somewhat remote possibility here. Instead, I will indicate why this tentative hypothesis cannot be used *in support of* the constitutionality or morality of severe punishments.

It is important to clarify what has been accomplished thus far. A connection has been posited between desert and deterrence (and thus between retributivism and deterrence) by defending the following conditional (or tentative hypothesis): If capital punishment does not deter, then it is reasonable to believe that it is cruel. I have not maintained that the reasoning in support of this conditional is conclusive. Certainly I have not maintained that the death penalty is or is not an effective deterrent. Most important for the remainder of this chapter, I have not argued in favor of the converse of this conditional, that is, if capital punishment deters, then it is reasonable to believe that it is not cruel. This latter conditional cannot be defended for the simple reason that it is false. Surely no one is warranted in inferring that it is reasonable to believe that a punishment is not cruel from the supposition that it is useful. Such a conditional is vulnerable to familiar counterexamples that retributivists have long urged against deterrence theories, for example, their apparent commitment to draconian measures to promote utility. It may be plausible to suppose that the usefulness of a cruel punishment mitigates the blame for the authority who imposes it, but demonstrably useful punishments may be cruel nonetheless. Hence this tentative hypothesis should *not* be construed as a view about when punishments are *not* cruel, although it *is* a view about when punishments *are* cruel. Statistics about deterrence, according to this hypothesis, are relevant only to support the case *against* capital punishment on retributive grounds. This interpretation must be kept in mind as attention is finally turned to the question of whether and to what extent this

hypothesis can be used to understand recent Supreme Court decisions applying the Eighth Amendment.

CRUELTY, THE DEATH PENALTY, AND THE SUPREME COURT

I am puzzled about the questions deemed relevant by the Supreme Court in its determinations of whether death sentences under various statutory schemes constitute cruel and unusual punishment. On several occasions the Court has identified "the dignity of man" as the "basic concept underlying the Eighth Amendment" (*Trop v. Dulles*, 1958). Surely the retributivist can have no objection to this approach so far. But soon thereafter the focus becomes curiously misdirected. For instead of developing and applying a theory of human dignity, the Court has voted to uphold or strike particular statutes primarily by examining the extent to which they allow *discretion* in sentencing. These decisions have been confusing. Statutes have been declared unconstitutional both because they afford too much (*Furman v. Georgia*, 1972) or too little discretion (*Woodson v. North Carolina*, 1976) to the sentencing authority. For the most part, however, it is the arbitrary, unprincipled, or capricious exercise of discretion in sentencing that has provided the typical basis on which state statutes have been overturned.⁶ One justice has maintained that "the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments" (*Furman v. Georgia*, 1972, p. 274, Brennan, J., concurring).

Unfettered discretion is susceptible to many obvious and familiar abuses. But the fundamental problem here is: What does the extent of discretion in sentencing have to do with the question of whether a punishment is *cruel*? Cruelty seems essentially *non-comparative* (Feinberg, 1974); a punishment for an offense does not become more or less cruel in virtue of the fate of other persons who have committed that offense. A punishment does not decrease in cruelty because it is imposed more frequently, or because it is

imposed pursuant to identifiable standards. Every reasonable person should denounce unprincipled sentences, but it seems odd to object to statutory schemes that allow such punishments on the ground that they are cruel. A more compelling criticism is that excessive discretion in sentencing raises difficulties falling under the due-process and equal-protection clauses of the Fifth and Fourteenth Amendments. Sometimes there is room for doubt about whether the justices really are talking about cruelty at all. Justice Stewart writes, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual" (*Furman v. Georgia*, 1972, p. 309, Stewart, J., concurring). The adjective *cruel* does not seem especially apt here. Hence confusion is appropriate in attempts to understand why the Court has been so anxious to preserve the proper amount of discretion in impositions of the death penalty, if its central concern is with the *cruelty* of that sentence.⁷

This oddity has been noted by those justices who would find all statutory schemes that impose the death penalty to be unconstitutional. Justice Brennan remarks:

I do not understand that the Court disagrees that "in comparison to all other punishments today . . . the deliberate extinguishment of a human life by the State is uniquely degrading to human dignity." For three of my brethren hold today that mandatory infliction of the death penalty constitutes the penalty cruel and unusual punishment. I perceive no principled basis for this limitation. (*Gregg v. Georgia*, 1976, p. 230, Brennan, J., dissenting)

Presumably Justice Brennan is challenging the plurality to explain why the issue of whether the death penalty is imposed automatically, as opposed to pursuant to (broad or narrow) discretionary powers, is relevant to the determination of whether that sentence is cruel.

How might this curious focus of the Court be explained? Why has a so clearly *substantive* question been treated almost exclu-

sively as a matter of criminal *procedure*? Perhaps a bridge connecting cruelty with excessive discretion in sentencing might be provided by deterrence. It is reasonable to suppose that discretion in sentencing and the efficacy of capital punishment as a deterrent are related in the following way. One might expect that the deterrent efficacy of a threatened punishment for a given offense would vary inversely with the degree to which sentencing authorities have exercised discretion in failing to impose that punishment for that crime. As more opportunities to escape a dreaded punishment become available, it is less likely that the threat of that punishment will deter prospective offenders. If similar offenders in similar circumstances are not all sentenced to death because of lenient exercises of discretion, a greater number of potential criminals might convince themselves that that sentence will not be imposed on them. The notorious "it can't happen to me" syndrome becomes a reasonable belief rather than a transparent rationalization.

The existence of such a connection between discretion and deterrence has been countenanced by at least some members of the Court. Justice White writes:

A major goal of the criminal law—to deter others by punishing the convicted criminal—would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. (*Furman v. Georgia*, 1972, p. 399, White, J., concurring)

Now one may have reservations about accepting this view in its full generality. Few criminals study Supreme Court opinions; most are unlikely to be influenced by such factors as the amount of discretion available to sentencing authorities. But the above connection between discretion and deterrence gains plausibility in the context of capital punishment. The small but growing number of executions since the restoration of the death sentence is a matter of common knowledge, and it is not unreasonable to suppose that at least a few persons who have committed capital crimes would

have been deterred but for their awareness that the ultimate penalty was unlikely to be imposed.

So perhaps the Court's concern with discretion can be explained by reference to its interest in preserving whatever efficacy capital punishment may be assumed to have as a deterrent. Of course, this account of the Court's focus on discretion becomes intelligible only if its concern for deterrence can be explained. Why should the Court be interested in deterrence in its attempts to decide whether the death penalty is cruel? One possible explanation invokes the earlier tentative hypothesis relating deterrence and cruelty. But notice how this hypothesis must be interpreted before the requisite connection between discretion in sentencing and the constitutionality of capital punishment can be established. In order for the conceptual gap between discretion and cruelty to be bridged by this hypothesis, its conditional must be *misinterpreted* to state that if a sentence is useful, then it is not cruel. This attempt to make sense of the Court's focus on discretion, then, pays the price of reconstructing the Court's reasoning as unsound.

Perhaps it is advisable to proceed more slowly here. I have suggested that the Court's concern with discretion in sentencing might be explained by supposing that it has reasoned roughly as follows: (1) if discretion in imposing a punishment is decreased, then the extent to which the threat of that punishment deters prospective offenders can be expected to increase; (2) if the extent to which the threat of that punishment deters prospective offenders can be expected to increase, then that punishment is socially useful; (3) if that punishment is socially useful, then that punishment is not cruel; (4) if that punishment is not cruel, then that punishment conforms to the Eighth Amendment; and (5) if that punishment conforms to the Eighth Amendment, then, in the absence of other difficulties, that punishment is constitutional.

If this argument were sound, a decrease in the amount of discretion available to sentencing judges would help to make capital punishment constitutional. However, this argument is unsound. Its third premise is false and is not equivalent to the

tentative hypothesis I defended in the first part of this chapter. Any plausibility that this false conditional might appear to possess derives from confusing it with its converse, that is, if a punishment is not socially useful, then that punishment is cruel. At most, the reasoning of the Court shows that *one* argument against capital punishment may be unsound. But even if the death penalty is useful—and the present state of empirical knowledge does not inspire much confidence that it is—it may still be cruel. If I am correct, the absence of deterrence is a sufficient, but not a necessary, condition to believe that a severe punishment is cruel. Hence my attempt to account for the Court's focus on discretion in holding that capital punishment is not cruel accuses the plurality of *either* the fallacy of equating a conditional with its converse, *or* the mistake of supposing that punishments are not cruel because they are socially useful. I fail to understand how the conclusion that capital punishment is not cruel can be established without developing a more detailed theory of human dignity than the court seems inclined to provide.

Legal commentators have sketched at least one alternative explanation of the Court's emphasis on discretion in deciding whether capital punishment is cruel, but it seems even less persuasive than that entertained (though rejected) here.⁸ Charles Black (1981) speculates that "the psychological cruelty of death . . . would be greatly heightened by the victim's awareness . . . that he has been chosen without solid reason in law for the difference in treatment" (p. 106). This rationale differs from the explanation considered above insofar as it regards cruelty as comparative. Black assumes rather than argues that a punishment becomes less cruel because it is mandated, or imposed upon all others similarly situated. His suggestion gives rise to the paradoxical result that the death sentence would not be cruel if defendants who had been arbitrarily selected to receive it were kept ignorant of the good fortune of others who had been spared. I conclude that one should be critical of the Court's reasoning about capital punishment until more plausible accounts of its focus on discretion are produced and assessed.

CONCLUSION

Hopefully it should be clear where this investigation leaves the potential victims of crime and their demands for stiffer punishments. They should be confused about the reasoning of the Supreme Court in its attempt to formulate the conditions under which the imposition of the death penalty is not cruel. They should be willing to concede, in opposition to Hart (1968) and his followers, that any evidence about the lack of deterrence supports the conclusion that capital punishment is cruel, and therefore that it is undeserved and unjustified. And they should be skeptical that any evidence in favor of deterrence supports the conclusion that capital punishment is not cruel. Retributivists should be somewhat concerned about deterrence. But whatever the facts about deterrence may be, the understandable desire to be protected from violent crime should not be expressed in demands for extremely severe punishments.

NOTES

1. Some legal philosophers who concede that exemplary punishments are irrelevant to *desert* conclude that their (supposed) relevance to sentencing proves that just punishment cannot be purely a function of desert (Morris, 1984, p. 187).
2. For useful distinctions among kinds of retributive theories, see Cottingham (1979, p. 238).
3. For skepticism that any mode of inflicting the death penalty is painless, see Gardner (1978, p. 96).
4. Here my assumption is that much can be learned about what makes punishments cruel by examining nonpunitive inflictions of suffering.
5. Intention or motivation is also relevant in deciding whether inflictions of suffering constitute *punishment* (*Fleming v. Nestor*, 1960).
6. Some statutes have been overturned because the severity of the punishment is disproportionate to the gravity of the offense (*Coker v. Georgia*, 1977; *Solem v. Helm*, 1983).

7. Chief Justice Burger notes, "This claim of arbitrariness . . . manifestly fails to establish that the death penalty is a 'cruel and unusual punishment'" (*Furman v. Georgia*, 1972, Burger, C. J., dissenting).
8. For a second possible response, see Murphy (1979).

REFERENCES

- Anonymous Note. (1966). "The Cruel and Unusual Punishment Clause and the Substantive Criminal Law." *Harvard Law Review*, 79, 635.
- Bedau, Hugo. (1987). *Death is Different*. Boston: Northeastern University Press.
- Bentham, Jeremy. (1982). *An Introduction to the Principles of Morals and Legislation*. London: Methuen.
- Black, Charles. (1981). *Capital Punishment*. New York: W. W. Norton.
- Coker v. Georgia*. (1977). 433 U.S. Reports 584.
- Cottingham, John. (1979). "Varieties of Retribution." *Philosophical Quarterly*, 29, 238.
- Feinberg, Joel. (1970). *Doing and Deserving*. Princeton: Princeton University Press.
- Feinberg, Joel. (1974). "Noncomparative Justice." *Philosophical Review*, 83, 297.
- Fleming v. Nestor*. (1960). 363 U.S. Reports 603.
- Furman v. Georgia*. (1972). 408 U.S. Reports 238.
- Gardner, J. (1978). "Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment." *Ohio State Law Journal*, 40, 96.
- Gregg v. Georgia*. (1976). 428 U.S. Reports 153.
- Hart, H. L. A. (1968). *Punishment and Responsibility*. New York: Oxford University Press.
- Kant, Immanuel. (1965). *The Metaphysical Elements of Justice*. Indianapolis: Bobbs-Merrill.
- Mabbott, J. D. (1939). "Punishment." *Mind*, 48, 152.
- McCloskey, H. J. (1965). "A Non-Utilitarian Approach to Punishment." *Inquiry*, 8, 239.
- Morris, Norval. (1984). *Madness and the Criminal Law*. Chicago: University of Chicago Press.

- Murphy, Jeffrie. (1979). *Retribution, Justice, and Therapy*. Dordrecht: D. Reidel.
- Nathanson, Stephen. (1987). *An Eye for an Eye?* Totowa, NJ: Rowman & Littlefield.
- Solem v. Helm*. (1983). 463 U.S. Reports 277.
- Trop v. Dulles*. (1958). 356 U.S. Reports 86.
- Von Hirsch, Andrew. (1986). *Past or Future Crimes?* New Brunswick, NJ: Rutgers University Press.
- Woodson v. North Carolina*. (1976). 428 U.S. Reports 325.

The Controversy over Shared Responsibility

Is Victim-Blaming Ever Justified?

ANDREW KARMEN, PH.D.

THE ORIGINS OF THE DEBATE

Criminologists frequently challenge one another's commitment to objectivity and neutrality. They argue among themselves over whether a particular theoretical perspective is biased, perhaps in favor of the entrenched legal system and the economic interests it protects, or whether some criminologists are too forgiving of delinquency or others are too punitive toward street crime. The questions of subjectivity, partisanship, and bias arise repeatedly in victimology as well as in criminology. On close inspection, it becomes evident that the field of victimology has its rifts and factions, just as criminology does. At the risk of oversimplifying its history, victimology started off in the 1940s and 1950s with an "antivictim" slant. But a new consensus within victimology that emerged during the early 1970s and has predominated ever since maintains a "provictim" orientation.

The first criminologists to consider themselves victimologists devoted their attention to the role of victims in the generation of

criminal activity. Adopting what can be called an *interpersonal interactionist perspective*, they focused on instances of "shared responsibility." They raised the possibility that the actions of victims before, during, and after they were harmed can often be characterized as careless, risky, or downright inciting. They constructed typologies of victims, indicating that a substantial proportion (depending on the crime) can be criticized or faulted for what they did or did not say or do. They anticipated that research studies of large numbers of incidents would surely reveal patterns of blameworthy behavior on the part of certain crime victims that contributed in some degree to their losses, injuries, and suffering.

The terms coined by the pioneers in the field reflected their preoccupation with prior relationships and events that immediately preceded the crime: the "duet frame of reference" (Von Hentig, 1941); the "penal couple" (Mendelsohn, 1956), and the "doer-sufferer relationship" (Ellenberger, 1955). It was argued that the victim in many instances leads the "evil doer into temptation" (Von Hentig, 1941, p. 303) and that the victim and the criminal "profoundly work upon each other, right up until the last moment" (Von Hentig, 1948, p. 384). The distinction between offender and victim is not "clear-cut" but "vague and blurred in individual cases" (Mannheim, 1965, p. 672). Certain victims "sent out signals" that, when "decoded, trigger or generate criminal behavior in the doer" (Reckless, 1967, p. 142). Individuals are admonished that they have a "functional responsibility" to avoid provoking others and to take preventive measures (Schafer, 1968, p. 152). Some murder victims, because of their inflammatory actions right before their deaths, were branded as "major precipitating causes" and contributors to their own demise (Wolfgang, 1958, p. 264). It was suspected that certain "precipitative" murder victims secretly harbor a death wish but are unable to carry out their suicidal impulses on their own (Reckless, 1967; Wolfgang, 1959). Likewise, some rape victims are deemed "not virtuous, innocent and passive" (Amir, 1971, p. 275). As for victims of property crimes, the typical victim is pictured as a careless person to be condemned for

setting up a temptation–opportunity situation “which virtually invites theft” (Fooner, 1971, p. 313). This first wave of victimologists thought that, by exposing the dynamics of victim–offender relationships, they could improve the otherwise static, one-sided, perpetrator-centered explanations traditionally offered by criminologists (Fattah, 1979).

A number of important concepts were derived from the overarching theme of shared responsibility. Specific blameworthy actions were categorized under the headings of “victim facilitation” (making the criminal’s task easier through negligence about security precautions); “victim precipitation” (rash, reckless, and risky behavior); and “victim provocation” (inciting acts that instigate violent responses). A blue-ribbon presidential commission developed working definitions for these concepts and searched through samples of police files in seventeen cities to derive estimates of how often victims, through their own misguided actions, precipitated robberies, assaults, rapes, and murders (National Commission on the Causes and Prevention of Violence, 1969).

But this spirit of enthusiasm for inquiries into what certain victims “did wrong” for which they could be faulted touched off a backlash. Starting in the 1970s, some victimologists began to argue that their discipline, despite its aspirations toward objectivity, harbored an antivictim strain within it so long as researchers limited themselves to an interactionist approach. Specifically, objections were raised against those large-scale investigations that sought to reconstruct the events leading up to the crimes, because such inquiries inherently and inevitably would turn up evidence of foolish mistakes, rash decisions, or needlessly inflammatory behavior that (in hindsight, it seemed) clearly shaped the unfortunate outcomes.

Those victimologists who criticized this earlier direction in empirical research loosely constituted a different school of thought. They openly identified themselves as advocates for those who had been harmed by criminals and who were then blamed for bringing about their own plight. They questioned the premises of

the interpersonal interactionist approach and attacked the implications of the notion of shared responsibility. The tendency to assign blame to victims was seen as reinforcing similar beliefs and rationalizations held by most offenders (Fattah, 1976, 1979; Schwendinger and Schwendinger, 1974; Sykes and Matza, 1957; Symonds, 1975, p. 22). Victim blamers were said to cling to a comforting belief in a "just world" in which people got what they deserved. By contending that victims must have done something "wrong," they would not have to consider seriously the disconcerting alternative of a world governed by unpredictable, unnerving random events claiming the lives of totally innocent victims (Lerner, 1965; Symonds, 1975). Victim-blaming victimologists (especially in cases of rape) were condemned for undermining the discipline's humanitarian orientation toward alleviating suffering (Anderson and Renzetti, 1980; Brownmiller, 1975; Weis and Borges, 1973). Explanations about criminal incidents that centered on victim precipitation were dismissed as examples of a fallacy of circular reasoning in causation theory in which the victim's behavior is taken as both the necessary and the sufficient cause of the perpetrator's lawbreaking (Franklin and Franklin, 1976, p. 134; Reiff, 1979, p. 12; Sheley, 1979, p. 126; Teevan, 1979, p. 7).

Unfortunately, the most extensive analysis and critique of the tendency to blame victims for their own misfortunes (Ryan, 1971) did not specifically address criminal victimization; instead it focused on social problems like poverty and unemployment. The doctrine of individual accountability for personal difficulties was branded as a blame-shifting ideology used to shield vested interests and faulty social institutions from well-deserved criticism. Victim-blaming was derided as warped reasoning and was characterized as a step-by-step process that placed unwarranted stress on presumed differences between the attitudes and behaviors of victims as compared with those of the unafflicted majority. The alleged self-defeating, counterproductive outlooks and actions of victims were seen as the supposed causes of their problems. Just as victims were allegedly to blame for getting into trouble, escaping harm the next time danger arose was also their personal

responsibility. Following this logic, victim blamers were inexorably led to the recommendation that victims must change their ways if they are to avoid future trouble.

Victim-defending was presented as a necessary antidote that was both scientifically sound and politically just. Rejecting the assumptions and prescriptions of victim-blaming, it denies that victims are distinctly different in thoughts and actions from other potential casualties. They are not solely responsible for their plight, are not their own worst enemies, and are not the only ones who must change their ways (Ryan, 1971).

Victim-defending can be coupled with two alternative outlooks. The first is "offender-blaming." The perpetrators are held fully accountable for the harm they have inflicted on totally innocent persons. But this outlook is just another variation on the theme of individual responsibility, which leaves little room for an appreciation of the influences of environmental conditions and social forces on attitudes and behavioral patterns. The second alternative is "institution-blaming" (or system-blaming). This orientation is a more sophisticated approach to solving social problems because it takes into account the underlying root causes: the social-political-economic relationships that generate both victims and victimizers (see Elias, 1986; Karmen, 1990; Ryan, 1971).

In academic circles, opposing camps formed because the basic concepts of shared responsibility—facilitation, precipitation, and provocation—were defined and operationalized in inconsistent, imprecise, and confusing ways in various studies. (The terms *precipitation* and *provocation* were often used interchangeably, and thus an important distinction was blurred between attracting would-be offenders and instigating otherwise law-abiding persons to commit illegal acts.) But more important, on political grounds the process of finding fault and assigning blame predictably became a battleground on which different groups viewed their interests as being furthered or threatened. A great deal can be at stake, both within the criminal justice process and in the larger society, when the victim-blaming and victim-defending perspectives clash.

THE IMPORTANCE OF DETERMINING RESPONSIBILITY WITHIN THE CRIMINAL JUSTICE PROCESS

The question of whether victims share responsibility with offenders for crimes—and if so, to what degree—arises at every stage in the criminal justice process. All the decision makers in the system—police officers, prosecutors, juries, judges, and parole board members—must grapple with this issue when, for instance, a serious injury results from a fight that erupts out of a simmering feud between two rivals or enemies. The injured person who, according to onlookers, provoked the fight may be arrested for assault rather than be handled as a complainant. On the other hand, if the victor is taken into custody as the alleged assailant, a district attorney reviewing the case may drop all charges if it appears that the loser shared responsibility with the winner for the violence. If charges are pressed in a case with a blameworthy victim, the prosecutor may deem it unwinnable in court before a jury and may seek to negotiate a guilty plea by offering terms very favorable to the defendant. If a trial is held, a victim who does not appear totally innocent may lose credibility when testifying before a jury. A jury may vote to acquit if it considers the victim's actions so provocative that the defendant's violent responses seem justifiable or excusable as acts of lawful self-defense. If there is a conviction, the judge may impose a lesser punishment, seeing the victim's provocation as an extenuating circumstance. If the convict is sentenced to a term of incarceration, the parole board may vote for an early release if the victim is seen as having instigated the attack.

Besides influencing the decisions concerning punishment in the criminal justice process, the possibility of shared responsibility can have financial consequences. In a jurisdiction where an offender is compelled to undertake restitution to an injured party, the judge may reduce the amount to be repaid by considering victim provocation as a mitigating factor. Victim responsibility may also be taken into account in civil court when a jury or judge awards compensatory and punitive damages to a plaintiff in a

lawsuit. The criminal-injury-compensation boards now operating in most states can reduce the amount of reimbursement awarded to a victim held to be partly at fault for his or her own injuries and losses, or can even reject the claim entirely.

In select cases, if the responsibility for the violation of a law appears to be practically equal, as among combatants who inflict minor injuries on each other in a brawl, adjudication in criminal court seems inappropriate. When the labels *victim* and *offender* do not realistically describe who did what to whom, the case cannot be satisfactorily resolved by the criminal justice system, given its adversary framework and its objectives of determining innocence or guilt and imposing punishment. The combatants may be referred to a neighborhood justice center for alternative dispute resolution (ADR) to settle their differences and achieve reconciliation through negotiation, mutual restitution, and compromise.

THE CONTINUING CONTROVERSY OVER SHARED RESPONSIBILITY

The impact of the clash between the victim-blaming and victim-defending perspectives is not limited to the way certain cases are processed by the criminal justice system. The opposing perspectives shape criminal justice policies and social programs as well. The alternatives are most sharply differentiated in efforts to prevent rape, to respond to wife-beating, to handle the killings of wife beaters, to react to rioters' looting sprees, and even to reduce car thefts.

Gender differences between offenders and victims may inject strong emotions into the debate between the victim-blaming and victim-defending perspectives. Traditionally, charges of shared responsibility have arisen in the heated discussions about the "causes" of crimes committed by males against females. Victim-blaming arguments are heard most frequently in cases of rape and wife beating, but they also emerge in analyses of incest, street harassment, and sexual harassment at work. Victim blamers ac-

cuse certain victims of acquaintance rape—and even some females attacked by strangers—of harboring fantasies of being forced into submission, of foolishly disregarding warning signs, of rashly entering into risky situations charged with sexuality, of seductively arousing “uncontrollable” urges in their assailants, and of clumsily miscommunicating their real intentions and personal sexual limits (Amir, 1967, 1971). Victim defenders dismiss the contention that some rape victims are partly at fault in precipitating the sexually oriented attack by pointing out that force or threats of violence by males are never justifiable responses to females’ sexual overtures—whether real or perceived. Victim defenders interpret rapes as acts of neither passion nor lust, but as outbursts of hate, contempt, and even “terrorism” in an ongoing battle between the sexes. Victim-blaming outlooks place the responsibility for avoiding rape on females, who are exhorted to reduce risks by imposing severe restrictions on their own behavior. Victim-defending arguments lead to calls for profound changes in male behavior, and they locate the fault within the social institutions that condition boys and men to view girls and women as sex objects (see Brownmiller, 1975; Schwendinger and Schwendinger, 1974).

Sharp differences between the two outlooks also erupt when the plight of battered women is examined (often subsumed under the headings of “domestic violence,” “spouse abuse,” or “wife beating”). Victim-blaming arguments contend that some battered women provoke the men in their lives to beat them. The victims are said to be either too submissive (thereby inviting their mates to take advantage of them) or too aggressive (thereby inciting their “badgered” or “henpecked” mates to resort to force as part of a power struggle). If this imagery is accepted, battered women can be heavily blamed as instigators of male violence, or may be held partly responsible for engaging in mutual combat with their mates, or at least can be faulted as knowing accomplices trapped in sadomasochistic relationships. When these perspectives are adopted, then counseling couples or referring them to dispute

resolution centers follows as a cure for troubled relationships. In contrast, victim-defending arguments challenge the widespread traditions of male dominance within relationships and marriages (e.g., "to love, honor, and obey"), which motivate some men to use force to shore up or regain control of "their" women. Victim-defending perspectives lend support to efforts to establish shelters for battered women and for policies encouraging the arrest and vigorous prosecution of batterers (see Fagan, 1988; Schechter, 1982; Walker, 1984, Yilo and Bograd, 1988).

When battered women kill their abusive mates, an ironic twist in victim-blaming versus victim-defending often emerges. Victim blamers, who had found fault with the female's attitude and behavior before the crime, adopt victim-defending arguments in contending that the ultimate victim—the murdered man—did not deserve his fate. Similarly, victim defenders, who had previously argued that the battered woman was innocent of any charges of provocation, adopt victim-blaming arguments in maintaining that the dead man was indeed responsible for his own demise. An innovative legal strategy for battered women put on trial for slaying their tormentors seeks to convince the jury that the woman, trapped in a destructive relationship by a possessive and predictably dangerous man, could not receive effective protection from law enforcement agencies and the courts and had no choice but to resort to deadly force in self-defense (see Browne, 1987; Ewing, 1986).

Another clash between the victim-blaming and victim-defending perspectives unfolds periodically in the media in the commentary and interpretation that follow a looting spree in the aftermath of a "ghetto rebellion," an "urban riot," or a "civil disorder." Victim-defending viewpoints portray the owners of sacked stores as totally innocent: decent, honest, hardworking individuals trying to eke out a living under adverse conditions imposed by high rates of shoplifting and robbery. Victim-blaming proponents draw on a wealth of social science data that support the accusations of outraged ghetto residents that businesses in

their neighborhood often charge exorbitantly high prices for low-quality goods, resort to deceptive advertising come-ons and "easy-credit" installment-buying plans, and use high-pressure sales tactics to exploit their low-income customers (see Caplovitz, 1963). Victim-blaming arguments hold such inflammatory business practices responsible for provoking a criminal rampage by community residents against these targets of their wrath when the balance of power shifts to the disadvantage of merchants and the police during an uprising. The acceptance of victim-blaming arguments leads to calls for improving customer relations, tightening regulations concerning retailing practices, and alleviating slum conditions. The adoption of victim-defending perspectives leads to calls for shooting looters on sight, and for increasing the severity of punishment of those rounded up. Because there are often racial and ethnic differences between the victimized store owners and the crowds that loot their merchandise, people embroiled in this debate become intensely polarized (Karmen, 1978; Kerner Commission, 1968).

A review of the history of the auto theft problem reveals that victim-blaming accusations have been promoted by a lobby composed of the public relations representatives of the automobile manufacturers, insurance company spokespersons, and law enforcement officials. These variations on the theme of individual responsibility point to driver negligence as a primary reason for the high rate of auto theft. The preferred solutions are "Lock it and pocket the key" public awareness campaigns, directed at careless motorists who thoughtlessly facilitate crime by leaving keys dangling in the ignitions of their unattended cars. But victim-defending arguments point out that key facilitation as a cause of auto theft (primarily by juvenile joyriders) has declined in importance over the years. Most motorists are extremely crime-conscious and cautious, but they cannot possibly safeguard their vehicles from professional thieves intent on stealing them, who can start a car without the owner's key. Thus the problem persists not because of victim facilitation out of carelessness but because of designed-in vulnerabilities. Automakers still have not assigned a

high priority to vehicle security. The emphasis on victim irresponsibility distracts attention from corporate irresponsibility. From a victim-defending perspective, legislative efforts to force a handful of executives to improve vehicle security through engineering ("hardening the target") hold out more promise than either educational campaigns intended to change the alleged thoughtlessness of millions of motorists or law enforcement drives to curb the criminal activities of thousands of thieves (Karmen, 1979, 1981, 1982).

CONCLUSION

Applying the notion of shared responsibility yields a more balanced reconstruction and understanding of victim-offender interactions before and during incidents. The benefits derived from these insights could include greater fairness within the adjudication process and enhanced effectiveness in the development of victimization-prevention strategies. But two disadvantages arise. First, a tendency to be evenhanded in parceling out blame undermines the sense of moral outrage that fuels the provictim movement for social reform. Second, the tendency to become fixated on the two central actors in the drama deflects needed attention away from the larger social and cultural context within which they act and react, and the institutional sources of lawlessness that must be addressed and corrected. In extreme cases, a preoccupation with the attitudes and behavior of victims leads to the classic injustice of scapegoating people for problems that are beyond their ability to control.

To answer bluntly the question posed in the subtitle of this chapter, victim-blaming is never justified. It is always necessary to go beyond the narrow confines of victim-blaming and victim-defending, and to adopt a system-blaming perspective in order to appreciate the full impact of social institutions and environmental conditions on the attitudes and behaviors of both offenders and their victims.

REFERENCES

- Amir, M. (1967). "Victim Precipitated Forcible Rape." *Journal of Criminal Law, Criminology, and Police Science*, 58, 483-502.
- Amir, M. (1971). *Patterns in Forcible Rape*. Chicago: University of Chicago Press.
- Anderson, M., and Renzetti, C. (1980, July). "Rape Crisis Counseling and the Culture of Individualism." *Contemporary Crises*, 4(3), 323-341.
- Browne, A. (1987). *When Battered Women Kill*. New York: Free Press.
- Brownmiller, S. (1975). *Against Our Will: Men, Women, and Rape*. New York: Simon & Schuster.
- Caplovitz, D. (1963). *The Poor Pay More*. New York: Free Press.
- Elias, R. (1986). *The Politics of Victimization*. New York: Oxford University Press.
- Ellenberger, H. (1955). "Psychological Relationships between the Criminal and His Victim." *Archives of Criminal Psychodynamics*, 2, 257-290.
- Ewing, C. (1986). *Battered Women Who Kill: Psychological Self-Defense as Legal Justification*. Lexington, MA: Lexington Books.
- Fagan, J. (1988). "Contributions of Family Violence Research to Criminal Justice Policy on Wife Assault: Paradigms of Science and Social Control." *Violence and Victims*, 3(3), 159-186.
- Fattah, E. (1976). "The Use of the Victim as an Agent of Self-Legitimation: Toward a Dynamic Explanation of Criminal Behavior." In Emilio Viano (Ed.), *Victims and Society*, pp. 105-129. Washington, DC: Visage.
- Fattah, E. (1979). "Some Recent Theoretical Developments in Victimology." *Victimology*, 4(2), 198-213.
- Fooner, M. (1971). "Money and Economic Factors in Crime and Delinquency." *Criminology*, 8(4), 311-320.
- Franklin, C., and Franklin, A. (1976). "Victimology Revisited." *Criminology*, 14(1), 125-136.
- Karmen, A. (1978). "How Much Heat, How Much Light: Coverage of New York City's Blackout and Looting in the Print Media." In C. Winick (Ed.), *Deviance and Mass Media*, pp. 179-202. Newbury Park, CA: Sage.
- Karmen, A. (1979). "Victim Facilitation: The Case of Auto Theft." *Victimology*, 4(4), 361-370.
- Karmen, A. (1981). "Auto Theft and Corporate Irresponsibility." *Contemporary Crisis*, 5, 63-81.

- Karmen, A. (1982). "Auto Theft: Beyond Victim Blaming." *Victimology*, 5(2), 161-174.
- Karmen, A. (1990). *Crime Victims: An Introduction to Victimology* (2nd ed.). Pacific Grove, CA: Brooks/Cole.
- Kerner Commission. (1968). *Report of the National Advisory Commission on Civil Disorders*. Washington, DC: Government Printing Office.
- Lerner, M. (1965). "Evaluation of Performance as a Function of Performer's Reward and Attractiveness." *Journal of Personality and Social Psychology*, 1, 355-360.
- Mannheim, H. (1965). *Comparative Criminology*. Boston: Houghton Mifflin.
- Mendelsohn, B. (1956, July). "The Victimology." *Études Internationales de Psycho-Sociologie Criminelle*, 23-26.
- National Commission on the Causes and Prevention of Violence (NCCPV). (1969). *The Offender and His Victim*, Staff report by D. Mulvihill, L. Curtis, and M. Tumin. Washington, DC: Government Printing Office.
- Reckless, W. (1967). *The Crime Problem*. New York: Appleton-Century-Crofts.
- Reiff, R. (1979). *The Invisible Victim*. New York: Basic Books.
- Ryan, W. (1971). *Blaming the Victim*. New York: Vintage.
- Schafer, S. (1968). *The Victim and His Criminal*. New York: Random House.
- Schechter, S. (1982). *Women and Male Violence*. Boston: South End Press.
- Schwendinger, H., and Schwendinger, J. (1974). "Rape Myths in Legal, Theoretical, and Everyday Practice." *Crime and Social Justice*, 1, 18-26.
- Sheley, J. (1979). *Understanding Crime: Concepts, Issues, Decisions*. Belmont, CA: Wadsworth.
- Sykes, G., and Matza, D. (1957). "Techniques of Neutralization: A Theory of Delinquency." *American Sociological Review*, 22, 664-670.
- Symonds, M. (1975). "Victims of Violence: Psychological Effects and Aftereffects." *American Journal of Psychoanalysis*, 35(1), 19-26.
- Teevan, J. (1979). "Crime Victimization as a Neglected Social Problem" *Sociological Symposium*, 25, 6-22.
- Von Hentig, H. (1941). "Remarks on the Interaction of Perpetrator and Victim." *Journal of Criminal Law, Criminology and Police Science*, 31, 303-309.
- Von Hentig, H. (1948). *The Criminal and His Victim: Studies in the Sociobiology of Crime*. New Haven: Yale University Press.
- Walker, L. (1984). *The Battered Woman Syndrome*. New York: Springer.

- Weis, K., and Borges, S. (1973). "Victimology and Rape: The Case of the Legitimate Victim." *Issues of Criminology*, 8(2), 71-115.
- Wolfgang, M. (1958). *Patterns in Criminal Homicide*. Philadelphia: University of Pennsylvania Press.
- Wolfgang, M. (1959). "Suicide by Means of Victim Precipitated Homicide." *Journal of Clinical and Experimental Psychopathology and Quarterly Review of Psychiatry and Neurology*, 20, 335-349.
- Yilo, K., and Bograd, M. (1988). *Feminist Perspectives on Wife Abuse*. Newbury Park, CA: Sage.

Preferring Punishment of Criminals over Providing for Victims

ROGER WERTHEIMER, PH.D.

INTRODUCTION

The past two centuries have been an extraordinary era for criticism and reform of institutions and social practices. Unprecedented egalitarian and humanitarian movements have arisen to protest and improve the condition of victims of every variety of evil, personal and impersonal, natural and social. The beneficiaries of these movements belong to all manner of groups: racial, ethnic, and religious minorities, the poor, the insane, the orphaned, the handicapped, the homosexual, the young, the elderly, the female, the animal, the unborn, and so on. Many of these movements had few followers and fewer victories until deep into this century, but most had precursors in the last century, which challenged the moral legitimacy of accepted practices.

The criminal justice systems of this era have inevitably been participants, as mechanisms for resisting reforms, as enforcers of established reforms, and as the targets of reform. The modifications of criminal justice systems have been diverse, as have the

motivations for them. What is now the most conspicuous element of the system, the police force, was not even conceived of before this period. Originating early in the nineteenth century as a modest effort to control urban riots and street crimes, police departments have evolved into major social and political forces in urban life, and in suburban and rural life as well. Their functions and focuses have expanded beyond the enforcement of a restricted range of criminal laws to encompass not merely the enforcement of an odd lot of laws, noncriminal and criminal alike, but also well-nigh any errand that goes unassigned to other agencies of the modern welfare state (Wertheimer, 1974). The implications of this expansion are not well understood; some ways that it might bear on the history of reform will be suggested at the end of this chapter.

Before the police arrived on the scene, older and more essential elements of a criminal justice system began to be subjected to critique and reform. I am not here alluding to the various campaigns against the criminalization of this or that activity. (Such campaigns have been primarily twentieth-century phenomena, and their main targets have been the so-called victimless crimes.¹ Tampering with central, essential prohibitions of the criminal code has not been seriously contemplated.) What has been the subject of constant questioning and repeated revision since the late eighteenth century is the distinctive activity of the criminal justice system, namely, criminal punishment. The propriety of retribution and the efficacy of punishment for deterrence, reform, or rehabilitation have been challenged, so that no rationale or goal of punishment now seems secure. The violence of punishment (or at least the visibility of it) has been minimized, along with its publicity and much of its blatant degradations. Alternatives to punishment, particularly regimens of enforced noncondemnatory psychotherapy, have been championed. For philosophers, even the very concept of punishment now seems a puzzle (Wertheimer, 1983).

Much of this evolution in the ideology and penal institutions of the criminal justice system is comprehensible within the larger

cultural context of concern to reduce unwarranted suffering and indignity. Both the older movements to ameliorate prison conditions and the newer interest in the rights of prisoners fit into that framework. To some degree, the same may be said of the recent interest in the rights of preconviction criminal suspects and defendants, though in this case the recognition of rights was initiated more as a means of constraining police power and protecting the integrity of the legal system than as a result of a revision in society's conception of the rights of individuals.²

The current movement to protect the rights and interests of crime victims may seem to be simply another example of this general reformist trend of modern times. Yet, although the crime-victim reform movement must of course be viewed within this context, various features of the history of this movement are untypical and, in combination, quite puzzling. Part of the puzzle is the very recency of any politically significant concern with the plight of crime victims. Governmental mistreatment of crime victims may not be quite as ancient as some other species of political injustice, but because in one form or another it long antedates the whole era of social reform movements, one wonders why, unlike so many other injustices, it did not become a target of protest until the late twentieth century.

That question is made specially perplexing by a confluence of factors. First, unlike in most other systematic institutional injustices, the victims here are not pariahs or political impotents: the victims of crime comprise an unstigmatized class that cuts across all other social categories and includes many persons with substantial social, economic, and political power. Second, unlike most other systematic institutional injustices, governmental mistreatment of crime victims has generally been pointless and purposeless, profiting no one. And third, unlike in most other institutional injustices, the recognition of the injustice of the practices has not required any significant change of the community's moral principles and beliefs. These and other features of the situation need to be presented in more detail if the puzzle is to be appreciated.

JUSTIFYING PRIORITIES

Our criminal justice system dispatches patrols to prevent crimes, and its penal system aspires to deter potential offenders and to incapacitate and reform criminals to prevent further crimes. Yet, once a crime has been committed, the victim whom that state strove so energetically and expensively to protect seems to be immediately forgotten and left to nurse his or her own wounds while the state fixates on the pursuit, prosecution, and punishment of the criminal.

That pursuit can seem single-minded, short-sighted, and tunnel-visioned. Our criminal justice system seems devoted to punishing the guilty, not as a means of protecting the innocent, but as an end in itself, for it pursues that goal in a manner indifferent and routinely inimical to the interests of the innocent injured parties. Aside from the general public goods it may bestow on every citizen simultaneously, our legal system offers virtually no benefits to a crime victim, except accidentally, while worsening his or her lot in various ways. It aggressively acquires items of evidentiary value for apprehending, prosecuting, and sentencing criminals but denies the victim control and use of evidentiary items that she or he owns until the conclusion of the trial. Moreover it generally acts as no more than a passive conduit in the acquisition and return to the owner of items lacking evidentiary value. It subjects victims (and their families and friends) to diverse and often gratuitous inconveniences and embarrassments, effectively precludes them from compelling the convict to make restitution, and in other ways often interferes with a victim's attempts to make himself or herself whole.

Until quite recently, modern legal systems have regularly displayed a decided preference for punishing the perpetrator and a relative lack of interest regarding the victim's due. It is natural to wonder what explains this tendency of legal systems and why a countertrend has taken so long to emerge.

Some structural features of this situation are readily rationalized by arguing that community resources are expended more

efficiently on law enforcement (i.e., capturing, convicting, and punishing criminals) than on aiding crime victims because the former is a paradigm "public good" whereas relief for victims is principally a "private good." Generally, an uncaught criminal is likely to commit further crimes, and her or his unpunished offenses are likely to encourage others to do the same. Helping a victim helps only that victim (or at most only the small circle of people who care about, or are dependent on, that victim), whereas the apprehension and punishment of a miscreant may provide benefits to everyone alike. This situation is comparable to that of public health provisions. The state can more economically and efficiently engage in preventive measures—public sanitation, inoculation programs, and the like—than in socialized medical treatment of all who happen to fall ill. With both crime and disease, many essential preventive measures cannot be managed effectively or at all by individuals acting on their own. By contrast, much of the response to injury can be managed as efficiently by individuals as, or more efficiently than, by any state scheme. Generally, individuals can insure themselves against the losses they individually incur when preventive measures fail; individuals are more motivated to take the precautions they can manage individually when they bear the burdens of failing to. In short, a plague of crime threatens the maintenance of a political order, and the requisite conformity to law may not be motivated without a state-supported penal system for violators; but although relief for victims may be desirable, generally its provision is neither a political necessity nor an impossibility without state participation.

In pursuit of the legitimate public goods of law enforcement, some sacrifices by crime victims must be imposed if a legal system is to operate justly. For example, the demands of a trial, fair to both prosecution and defense, require that the integrity of evidence be preserved, and this preservation may warrant temporarily denying crime victims, along with third parties, the use of some of their property. Generally the unavoidable inconveniences are relatively minor, especially when compared to the consequent public benefits.

Considerations of this kind may provide a plausible justifica-

tion of many of the most basic features of the common pattern of governmental treatment of crime victims. And even if these and other such defenses are ultimately unsuccessful as justifications, they seem sufficiently plausible to provide an adequate explanation of governmental patterns.

EXPLAINING INJUSTICES

However, victims-of-crime reformers are protesting not against "unavoidable inconveniences," but against major and minor inconveniences, indignities, and hardships that appear quite avoidable and devoid of any ready rationale. So the justification sketched above cannot (by itself) offer any understanding of the plentiful, pervasive, and persistent official and unofficial practices being protested.

The natural strategy of any reform movement is to begin by focusing on the most blatant inequities and irrationalities, and to enter complaints against more defensible practices only after some success against the less defensible ones. Because the victims-of-crime reform movement is still in its infancy, the proposals pressed to date are, predictably, in the ideological mainstream. They don't pit the victims' interests or rights against those of the offender or the general community. Most of the popular proposals aren't even expensive to implement, and those that are call for adaptations of familiar governmental mechanisms. For example, the much-discussed forms of financial relief for medical or property losses suffered by needy crime victims are compulsory social insurance schemes that, however costly, are far from radical in their principles. The current recommendations for facilitating restitution are designed to prevent serious challenges to the traditional subordination of the demands of restitution to those of crime control. Perhaps some day reformist demands will require a reconsideration of whether that subordination should be a political absolute. But as things are, no rethinking of traditional moral and political

principles seems required for recognizing the inequities pervading governmental treatment of crime victims.

Yet the obvious reasonableness of the reformers' complaints makes their necessity only more remarkable. It is precisely because the reformist critiques seem so commonsensical that the prevalence and persistence of the injustices committed against crime victims are puzzling. Blatant inequities and irrationalities in this area are the norm, not the exception, and have been for ages; yet we are only now beginning to rectify or even recognize these conditions. Why is this?

The egregious practices appear utterly devoid of utility for anyone, burdening the victim while benefiting no one. They benefit neither the community in general, nor any special interest group, not even the criminal. And again, the victims bearing the burdens are, as often as not, respected members of the community, well-to-do, and not without political influence. Thus the familiar social and economic analyses that may plausibly explain other recurrent forms of injustice (e.g., in terms of class exploitation) seem incapable of accounting for the phenomena here.

Of course, the sheer persistence of these practices poses no great puzzle, because the hardships they impose are distributed in a haphazard fashion that does not foster the formation of an effective reform movement. Moreover crime victims share no commonalities to bring and hold them together in a movement. Such factors may suffice to explain any failures to overcome institutional inertia, but they are no help in explaining why the reform movement is arising and making headway now rather than fifty or a hundred years earlier or later, nor why the objectionable practices originated to begin with.

Most of the common practices—such as routinely subjecting victims to sitting with their assailants in small pretrial holding rooms, leaving victims unnotified of the progress of "their" case, and similar official and unofficial instances of inattention to crime victims' interest—may seem, when taken case by case, to be rather random arrangements, so arbitrary and alterable as to appear almost inexplicable. It is only when taken together that they seem

systematic. Yet, although still appearing to be without purpose, intent, or function, they seem symptomatic of some deep principles inherent in the system. They form a pattern of purposeless neglect that is consistent with—though not recommended by—the rationale sketched above for the basic structure of governmental priorities. Though this systemic neglect is not justified by the legitimate subordination of crime victims' interests to essential aims of governance, it may be explicable as a side effect of a process that promotes the arrogance of power.

Note that this systemic neglect occurs, not in every society, but peculiarly in the criminal justice systems of nation-states where conflict resolution is dominated by the state. In olden times, sovereigns provided civil courts to be used for an impartial and decisive settlement of disputes between private parties. Generally, the police power of the state was used only against threats to the sovereign, its agents, or the community as a whole. It dealt with treason, counterfeiting, smuggling, and assaults on officials, but not with assaults on private parties or thefts of their property. The latter were left to private arrangements. Eventually, as both a consequence and a cause of the augmentation of state power, the state assumed authority over the criminal acts against the persons and property within its territory. Aggrieved individuals and their sympathizers were denied the right of retaliative action and were permitted only to make a complaint to the sovereign. In the new order the state defines the class of crimes, authoritatively prohibits certain acts, requires all subjects to report such acts to it and supply it with all pertinent information, takes suspected offenders into its custody, determines their guilt in its courts, and controls the disposition of their fates. The victim is not an actor in these proceedings, except perhaps as a witness with no special standing. The procedures of the criminal justice system may be initiated by a victim's complaint or by the state itself, but in either case the state does not act as the servant of the victim. The victim is merely an entity illegally harmed, and as such he or she is inessential to the criminal process, for a state may criminalize actions having no victims. The state may confine its criminal prohibitions to acts that

(the state believes) are wrongful harms; but in any case, the state proceeds against an alleged violator, not on the grounds that he or she harmed some person (the victim), but rather on the grounds that he or she violated an authoritative prohibition (the state's law). Throughout the whole drama, from investigation to arrest to punishment, the only adversaries in the conflict are the state and its allegedly disobedient subject; the victim (if any) is an impotent spectator with, at most, a bit part as witness in the official drama prompted by his or her personal tragedy.

Given the structure and function of this legal system and the ethos it sustains, a systemic indifference to the crime victim's interests is an unintended outcome that needs only the natural tendencies of individuals operating a bureaucracy to become a virtual inevitability, resistible only by an aroused citizenry. Like bureaucrats everywhere, police officers, prosecutors, and judges are generally disposed to jealously guard their prerogatives, to aggrandize power, and to limit their concerns according to their agencies' priorities. When those general dispositions operate within the peculiar structure and ethos of our criminal justice system, they become tendencies to treat the crime victim either as a mere resource for the system's aims or else as an unwelcome intruder with no legitimate stake in the institutional processes. Some officials may, as individuals, sympathize with a victim's plight, but the internal logic of the system they work within provides few if any motives for respecting the victim's interests.

The state's preference for punishing violators over providing for the victim's needs may seem reminiscent of a predilection that many people have. For when victims are left alone to seek their own redress, they commonly behave rather like states, disposed to focus on fixing the assailant's wagon even at the cost of tending the victim's wounds. However, the rationale offered above for the state's preference presumes no predilection for vengefulness, nor any need for vindication. Such motivation may indeed operate in states as well as in their subjects, but in either case, their operation is evidence of, and is explained by, the character of the agent. Our rulers now relate to us through law, not through the personal

relations that kings and patriarchs once claimed (Weber, 1947; Wolff, 1950). With that depersonalization of the authority relation, the sovereign became less disposed to regard crime as insubordination, a personal affront that calls for punishment as a means of vengeance. This depersonalization of criminal law and its violations is, I suggest, a prerequisite for the state's recognition of the legitimate interests of the victim. But this precondition already was fulfilled a few centuries ago with the emergence of governments "of law, not of men," so it sheds little light on the lack of protest against the ill treatment of crime victims until the past few decades.

EXPLAINING REFORM HISTORY

The recency of the crime-victims reform movement still remains to be explained. Part of the puzzle here is an apparent lack of any alteration in our moral, political, or empirical beliefs, or in the corresponding realities, that coincided with and could explain the alteration in our attitudes toward the ancient defects in our legal systems. Another part of the puzzle is that our underlying attitudes here seem not to have changed at all. Prevalent attitudes regarding the rights of women, of African-Americans, of homosexuals, and so on have changed profoundly. So too, conceptions of the just deserts of the aggressor have altered over the past two centuries. However, none of these developments seems particularly relevant to conceptions of the deserts or entitlements of the victim. In fact, it's doubtful that we differ significantly from our predecessors (who never much pondered the legal plight of criminal victims) regarding the principles that make the current protests seem to us so reasonable; for example, the propriety of restitution by the wrongdoer to those she or he has wronged is hardly a new idea.

Certainly at least some of the current concern about crime victims comes from dovetailing with other causes of current interest. The clearest instance is the attention commanded by com-

plaints against police and prosecutorial insensitivities in the treatment of rape victims, which owes much to the momentum of the feminist movement. But such instances seem isolated and exceptional, and thus unlikely sources of strength of a generalized crime-victim movement. Indeed, that movement is already potent enough so that other causes are crowding themselves under its banner in hopes of gleaning some "gilt by association." A nice example here is the attempt by opponents of gun control to tuck themselves under the banner by opening it to cover potential crime victims and the means to preempt their becoming actual victims.

Another explanation claims that concern with the rights and interests of crime victims is a consequence or expression of the popular reaction against the recent legal recognition of an array of so-called rights of criminals (i.e., suspects, defendants, and prisoners). But that seems implausible if only because it's provincial: the current controversy over the rights of criminals is almost wholly confined to the United States, whereas American concern about crime victims has counterparts in other countries. Moreover the two issues involve quite independent principles, so champions of the rights of criminals feel no strain when championing the cause of crime victims, too. After all, the complaints made for crime victims are not against the criminal, but against the state's needlessly compounding crime victims' suffering. Nonetheless perhaps a concern about crime victims often does express some hostile overreaction against criminals and the "coddling" of them, just as some folks oppose gun control from what they conceive of as a concern about the interests of crime victims.

One last hypothesis merits consideration, even if it is mere speculation. Early on I mentioned the extraordinary expansion of the role of police departments from simple patrol and control of street crime to omnibus public service agencies. My sense of things is that, with police remaining rooted in the criminal justice system, this diffusion of their functions has effected a blurring of public conceptions and a dilution of old attitudes regarding the entire system of criminal justice, its laws, its procedures, its

officials, and our relation to them. Once, the system was symbolized by the judge, black-robed and on high, priestly and majestic, impersonal, unapproachable, master of the mysteries of the Law's contest with secular sin. Nowadays the system comes into our home and on the phone in the form of Officer Friendly and his less convivial colleagues. They're there to right a heinous wrong, referee a domestic wrangle, or relieve a granny's worries: it's all the same. Sure they can seem fearsome, but we don't think they are awesome. They're public Mr. Fixits, and there's nothing mysterious about them. And so it goes for the rest of the system they represent. The sanctity is gone from the hallowed halls of justice, and with it all presumption of propriety in our being humiliated by its procedures or officials when we've done nothing wrong. The justice system is now seen to be only another public service agency, there to serve our needs and interests, and answerable to us and our common sense when it proceeds toward its main goals (catching, convicting, and confining criminals) unmindful of our interests in matters tangential to the achievement of those goals.

Whatever truth there may be in this impressionistic explanation, it remains worth wondering what has prompted the protests against the mistreatment of crime victims, if only because the protests may be portents of things to come, the first signs of future alterations in our response to what we call crime.

NOTES

1. I call them "so-called" because what has frequently been at issue in the protest is whether, in what sense, and to what extent certain activities have a real "victim." Protests against the criminalization of abortion are a clear case.
2. Regrettably, although understandably, debates about the rights of criminal suspects, the rights of criminal defendants, and the rights of prisoners regularly lump all three together as "rights of criminals," despite the incoherence of that conception within a legal system premised on a presumption of innocence (i.e., noncriminality) per-

sisting until proof of guilt by due process. In both their histories and their rationales, these different categories of rights show significant independence.

REFERENCES

- Weber, Max. (1947). *The Theory of Social and Economic Organizations*. New York: Free Press.
- Wertheimer, Roger. (1974). "Are the Police Necessary?" In E. C. Viano and J. H. Reiman (Eds.), *The Police in Society*, pp. 49-60. Lexington, MA: Lexington Books.
- Wertheimer, Roger. (1983). "Understanding Retribution." *Criminal Justice Ethics*, 2, 19-38.
- Wolff, Kurt H. (Ed.). (1950). *The Sociology of Georg Simmel*. New York: Free Press.

VI

EPILOGUE: AFTERTHOUGHTS

When a man assumes a public trust he should consider himself public property.

THOMAS JEFFERSON (1743–1826)

You can fool too many of the people too much of the time.

JAMES THURBER (1894–1961)

Politicians are the same all over. They promise to build a bridge where there is no river.

NIKITA S. KHRUSHCHEV (1894–1971)

All of us (politicians) have the luxury of making promises without having to follow up on it.

U.S. SENATOR MALCOLM WALLOP (b. 1933)

The biggest problem in the world
Could have been solved when it was small.

THE WAY OF LIFE ACCORDING TO LÃO-TZU, c. 565 B.C.
(Trans. by Witter Bynner)

We shall require a substantially new manner of thinking if mankind is to survive.

ALBERT EINSTEIN (1879–1955)

What Hope for Victims?

The Need for New Approaches, and for New Priorities

DIANE SANK, PH.D.

Is there hope for Victims?¹ Will it be possible to address the concerns of Victims of crime and injustice as society has begun addressing the requirements of other special-needs groups, such as the mentally and physically disabled?

Can we alter our biases against Victims of crime and injustice, much as we are successfully changing our prejudices against other Victims, such as women and ethnic minorities?

Will we be able to convince our legislators that equitable laws and their enforcement are essential if we are to provide fair representation and adequate protection for all Victims at all levels of society—in the streets, on public transportation, and in courts and social agencies—and if society and its representatives in government are to fulfill their role in the social contract?

¹As in Chapter 1, the word *Victim* is capitalized to help increase awareness and recognition of Victims.

A TIME TO REORDER PRIORITIES: SOME PROPOSED SOLUTIONS

As the Nobel Prize winner Albert Einstein sagely noted, "We shall require a substantially new manner of thinking if mankind is to survive." Nothing less than new approaches to this age-old problem are necessary if we are to right the wrongs perpetrated against the innumerable Victims of crime and injustice throughout human history. In addition to the varied observations and suggested solutions to help Victims and prevent future victimization offered in the previous chapters by our fine contributors, this chapter will propose some additional observations and suggestions for the reader's consideration.

CRIME

A New U.S. Constitutional Amendment

The Eighth Amendment to the U.S. Constitution (in the Bill of Rights) protects both the accused and the convicted criminal from excessive bail or fines, and from cruel and unusual punishments. Isn't it time for a new constitutional amendment to protect the Victim from excessive emotional suffering; from medical, psychiatric, and legal expenses; and from possible loss of employment? Under such an amendment, the Victim would receive fair reparations, to be paid by the criminals and/or society, which would provide the meaningful compensation that de Seife recommends in Chapter 5. Might such an amendment answer Wertheimer's concern in Chapter 25 and rectify governmental mistreatment of crime victims by altering our present criminal justice system and its bias against the Victim? This amendment would also allow Victims greater opportunity for participation in the trials of their victimizers, as Chu suggests in Chapter 8, including the rights, at the trial, to confront the accused and to present a "Victim impact" statement of the effect the crime had on his or her life and/or

family. A move in this direction was the 1991 Supreme Court decision permitting evidence about the Victim and the impact of the Victim's death to be given at the time of sentencing in capital murder trials (Greenhouse, 1991).

Gun Control

Is it possible for an equitable compromise to be effected between the polarized groups of pro- and anti-gun-control advocates? One way to achieve this would be to recognize that guns kill innocent people every day (as shown by Young and Grassi in Chapters 2 and 22, respectively) yet acknowledge that the availability of guns may be essential in preventing despots from taking power, or in defending people against dictators, as indicated by Caplan and Halbrook in Chapter 18 and 21, respectively. Can we mediate a solution whereby weapons would not be allowed on streets or on any public conveyances (trains, buses, and cabs—just as they are prohibited now on airplanes) but could be kept in one's home to protect individuals from robbers or the unjust actions of despots? Anyone can kill another using legally available "weapons" in or around one's home (such as kitchen knives, scissors, hammers, rocks, or even one's own hands), yet these potential "weapons" are not outlawed or otherwise restricted. The fact is that most of us abstain from intentionally injuring or killing others, because of cultural, religious, ethical, social, or legal prohibitions.

Guns are not the sole instruments for killing, but they contribute significantly to injuries and deaths and therefore should be restricted from public areas, where many people travel. However, by permitting individuals to keep handguns, rifles, and shotguns in their homes (along with those other potentially harmful "weapons"), society could maintain the protection and rights afforded by the Second Amendment to the Constitution while protecting the general public from the indiscriminate use of firearms.

On June 28, 1991 (Ifill, 1991), the United States Senate joined

the House in passing a handgun control bill mandating a five-day waiting period for all handgun purchases. Thus, the legislators have again offered a short-sighted solution to the crime problem, placating the gun control lobbies, but, as Lawson, Grassi, and Karmen point out in their chapters, not addressing the root causes of crime: in social and political conditions, including poverty, powerlessness, drugs, and insufficient police protection.

A Return to Safe Streets

Dramatic changes in modes of transportation have occurred in twentieth-century America. The earlier, and slower, types of transportation—walking, riding on horseback and in horse-drawn vehicles, and bicycling—have largely been replaced by rapidly moving cars, buses, and trains. In the process, many of our sidewalks and streets, especially at night, have been converted from busy yet leisurely traversed pedestrian thoroughfares into nearly deserted and—after sunset—dark canyons, except for the flashes of lights from passing vehicles silhouetting an occasional wary pedestrian.

We cannot reverse technology, nor would most of us want to, although the energy crises (especially the oil crisis) may necessitate rethinking our forms of transportation and present way of life.

If we are to continue our style of living (including modern forms of transportation), we must reorder our national and local priorities to provide sufficient funding for police and other criminal justice functions, so that all of us will be safe when we use such old-fashioned means of travel as walking and bicycling and will be encouraged to do so.

Not surprisingly, the response to such a proposal will probably be cries of "It will cost too much!"—cries that emanate mainly from our elected officials. However, these same government leaders manage to find billions of tax dollars for other "emergencies," either at home (e.g., savings-and-loan bankruptcies) or overseas (e.g., protecting the Panama Canal, or oil fields in the Persian Gulf, or the federal "War against Drugs" programs).

Well, there is an important "war," here at home, a war to regain control of our homes, our apartments, our streets, our neighborhoods, our means of transportation, and our parks, playgrounds, and other recreation areas. This is a real war, and we need people, power, and ammunition to win it. If we lose, it means the loss of individual liberties and freedoms, as we become slaves to fear, not able to walk on our streets when we wish or need to. The reality of this fear is substantiated by a *New York Times* report that concern about violent crime has kept "frightened" people from "walking the streets" (James, 1991). Additionally, a 1991 Gallup poll revealed that New Yorkers believe crime is the number one problem facing their city (Richards, 1991).

Paying for greater police presence on foot (plus patrol cars), brighter outdoor lighting, and more frequent buses and subways—as a means of protecting all citizens (wealthy and poor, advantaged and disadvantaged, minorities and majorities) from becoming Victims of vicious, senseless, even fatal crimes—should be "Priority Number 1" today.

The U.S. Senate Judiciary Committee reported "one reason for the rise in crime may be the decline in police officers" (*The Record*, 1991a). Supporting this finding was *The New York Times* report that attributed a "severe recession" of violent crime (down 18% from 1990) due to "extra police officers on foot patrol," with "criminologists, local merchants, street criminals, and a police commander," acknowledging the effect. Also, New York City Police "Commissioner Lee P. Brown and others said that a larger and more visible police presence has helped to deter crime" (James, 1991).

The cost of not supporting the rights of Victims and potential Victims will be greater than that of providing for their reasonable and valid needs as seen in the United States Bureau of the Census' report of \$174 billion as the "annual cost of criminal activity" to the Victim and potential Victims in 1985, reported by de Seife in Chapter 5. Indeed, in the long run, an investment in public safety would be economically beneficial and cost-effective. Reduced crime would result in lower medical and hospital expenses for Victims, law enforcement officers, and criminals; less time out of

work for Victims and police (a benefit for individuals, employers, and society); and less money and personal property taken by perpetrators. If the streets are free of criminals, more people will go shopping, take their children to parks and playgrounds, go to movies, theaters, and other cultural events—and, as they do, spend more money. Increased sales will bring more taxes and revenues to the government, thus compensating for the increased cost of improved security on our streets and in our cities. A lowered crime rate will also help restore public confidence that the social contract is being satisfied by government and will thus renew citizens' support of their role in that contract.

Rhetoric, lip service, and professed "concern" for Victims are no longer adequate. Actions must be taken that will truly protect Victims and prevent their victimization.

A step in this direction is the voluntary citizen (neighborhood) and child watch (child guardian) crime watch programs that are operating in cities and towns across our country. The Federal Bureau of Investigation has stated that these programs are one of the best ways to stop crime, and thus to prevent victimizations. These programs involve citizens in a low-cost, interactive, cooperative venture with their police departments, fostering good relations between them, while providing inexpensive extra eyes and ears for the law enforcement agencies. They also encourage and reflect people's concern for and sensitivity to one another as good neighbors and citizens.

There are many services (electric, gas, cable television) and delivery (oil, United Parcel Service, Federal Express) businesses, as well as governmental agencies (the U.S. Postal Service) where employees drive company cars or trucks. These companies should be encouraged to provide those employees with two-way radios, and to train them to spot and report crimes against persons (especially children) and property. This is another inexpensive, cooperative, and successful program, already begun in some communities, to help the police prevent and reduce the incidence of crime.

Recent and Proposed Legislation to Aid Victims

President Ronald Reagan's designation of National Crime Victims' Rights Week in May 1981 was a commendable beginning toward our nation's acknowledging the Victim as a real person, rather than the "nonperson" identified by Chu in Chapter 8. Recent achievements have addressed the rights of Victims, largely because of the efforts of a small number of dedicated, hardworking groups, particularly the National Organization for Victim Assistance (NOVA). Among the accomplishments reported by Young in Chapter 2 and de Seife in Chapter 5, is the passage of Victims' bills of rights, compensation programs, and state constitutional amendments. Also, whereas there were only two hundred Victim service organizations in the United States in 1982, there were about sixty-four hundred by 1989, according to NOVA, which has assembled the names and addresses of hundreds of such organizations that function on a national and local level. Many of these are listed in Part VII, "Help for Victims: Organizations and Resources."

Proposed legislation requires Victims or their survivors to be informed when their victimizer is scheduled to appear in court. Under other proposed legislation, crime Victims would be permitted to give the sentencing judge a statement on the impact of the crime on their lives. New Jersey passed such a law in 1991 (Cichowski, 1991), "the first of its kind in the nation," according to the president of the State Crime Victims' Coalition, who added that a "Constitutional Amendment" was still necessary to guarantee the Victims' right to attend the trial after testifying.

Other Types of Help for Victims

There are now consumer complaint (i.e., advocate) offices in various cities and states. Isn't it time for an office of advocate for Victims of crime and injustice to be established, at least at the state level? Such an advocate office could provide a twenty-four-hour

hotline to coordinate and oversee state Victim compensation programs, while serving as a clearinghouse of information and services for Victims in each state. Working with private groups like NOVA, they could provide information and help for Victims of crime or injustice.

Perhaps a more significant sign of our recognition of and commitment to the needs of Victims would be the creation of a national governmental agency and/or a presidential cabinet-level department for Victims (or victimology). The secretary and his or her department, as the Victims' chief advocate in government, would represent and protect Victims and work toward preventing their victimization.

INJUSTICE

Addressing Past Injustices

Injustice committed by government itself may be more difficult to address and prevent, as it emanates from the highest political authorities, who can hide such injustices and who may seek refuge from punishment under the cloak of sovereign immunity.

Lee's proposals (Chapter 20) to institute laws to permit the prosecution of wartime and even peacetime international criminals, even many years after they have committed political crimes, might break through the walls of national boundaries that have served, in the past, to enable these governments and political despots to evade the jurisdiction of international courts of justice.

Requiring international acts of injustice to be taken to the United Nations for resolution might strengthen that organization and its role as the last great hope for eliminating injustices, while enabling it to fulfill its original mandate to maintain world peace.

As a sign of our commitment, we must begin to respond to Victims of past injustice, for instance, peoples forced off their

hereditary lands (American Indians in the United States and Canada), peoples kept in slavery for hundreds of years (African-Americans), and as discussed by Kaku in Chapter 19, American citizens who lost their homes and businesses when they were incarcerated in the United States during World War II (Japanese-Americans).

In recognition of past injustices, we should provide the opportunity for *free* college, professional, or vocational education to all such Victims of injustice, who have suffered humiliation, pain, and even death—or to their descendants. Such a program would partly compensate for past wrongs to these groups by offering hope and improving the lives of future generations, and would emphasize our responsibility to prevent future injustices.

Need for Political Accountability and Responsibility

Now is the time for citizens to inform governments to “read our lips,” in order to understand that citizens have had enough of senseless, vicious crime and suffering Victims, and to realize that they “are not going to take it anymore” (i.e., crime, criminals, and victimization).

It is time also for all elected officials, politicians, and the courts to realize that *we Victims* (many of us already have become Victims, and all of us have a high probability of becoming Victims) want stronger, more meaningful legislation and its enforcement, to protect us from criminals and to guarantee our rights, in addition to the rights of defendants.

Perhaps only by threatening to renege on *our* responsibilities in the social contract, or by threatening to reject our part of that contract (as suggested by Lawson in Chapter 9), can we convince our government that we are serious about requiring them to uphold their part of that pact.

Or perhaps we should ask for a new type of agreement, for a new type of social contract—one that will truly protect us all, one that will truly be enforced, and one that will hold our officials responsible for achieving that goal.

As part of the existing or new social contract between governing bodies and their citizens, perhaps politicians should be held directly responsible (i.e., legally obliged to carry out their campaign promises or pledges, and legally liable if they fail, after being elected) to provide adequate protection for citizens, residents, and even visitors to their communities and cities. Such a measure might address some of the concerns of Lawson in Chapter 9, Grassi in Chapter 22, Fell in Chapter 6, Chu in Chapter 8, and others. Lawson, for one, suggests that the social contract is deteriorating and will continue to do so unless the level of victimization is significantly reduced. Fell observes that it is society's "political obligation" to provide for its Victims. He also cogently notes that the Achilles' heel of the social contract is the lack of a "third party" to enforce it. Both observations suggest that we should require political responsibility and accountability from our government officials.

The concept of responsibility is not new. It has been advocated that parents of children who commit crimes be brought to court and charged with responsibility for maintaining their children as law-abiding citizens (i.e., preventing them from committing crimes). At the Nuremberg trials beginning in 1945, heads of governments and members of their staffs were held responsible and found guilty of crimes committed against humanity during World War II.

Similarly politicians could be brought before a special federal court elected directly by the people and could be held responsible for unfulfilled campaign promises, such as "ridding" their towns of crime and criminals. If found guilty, they would suffer appropriate punishments (e.g., fines, jail sentences, or community service, to begin during or after the end of their term of office).

Thus citizens, as voters, could convey a message to our politicians, that we expect them not only to uphold the Constitution and the nation's laws but also to fulfill their campaign pledges or stop making promises unless they know they can and intend to fulfill them.

A WORLD WITHOUT CRIME AND INJUSTICE?

Is it possible to have a world *without* Victims of crime and injustice? Can such a dream ever become a reality?

Why not? It has been done before. Our hunter-gatherer ancestors, millions of years ago, as paleoanthropological evidence indicates, did not engage in group warfare or individual homicide. Even today some unacculturated cultures (i.e., they have not yet come into contact with or been assimilated by other cultures) live without engaging in warfare, killing, or stealing. They include nomadic hunter-gatherer peoples, like the !Kung San of South Africa, the Australian aborigines, and the Inuit (Eskimos) of Canada and Alaska in North America. These peoples have a stone tool technology and depend on wild rather than domesticated foods for survival.

The Nuer of East Africa subsist on fish, domesticated cattle, and plant foods; and the Lacandon of Mexico depend on maize and wild animals. Neither of these stone tool cultures engages in warfare or homicidal behavior. The Arapesh in the South Pacific are another stone tool culture and live peacefully on their lands.

We may not want to return to a hunter-gatherer Stone Age lifestyle. But perhaps we can learn from our ancestors and from those few unacculturated stone tool cultures that are still functioning today, without warfare or homicides, and therefore without Victims of such aggression. Perhaps we can cull the best from our past and combine it with the best from our present to create a future free of Victims of crime and injustice.

FINAL THOUGHTS

Given the history and plight of Victims, doesn't it seem appropriate and proper to reconsider our national and international priorities and to address the condition of all Victims of crime and injustice, *now*? Doesn't it seem to be the proper time to

develop new approaches and new perspectives, including greater sensitivity to and respect for every human's right to live free from the fear or threat of physical harm and mental torture?

Doesn't it seem remarkable that neither the U.S. Constitution nor the Bill of Rights contains any statement or provisions to protect the rights of Victims? Therefore doesn't it seem appropriate that our elected and appointed governmental officials should realize that *as Victims* or potential Victims, we want our governments to pass equitable laws, recognizing and protecting Victims and Victims' rights?

It would seem that:
 The time is *now*;
 The place is *everywhere*;
 The reasons are *clear*;
 The evidence is *overwhelming*;
 The need is *urgent*;
 for a strong
 VICTIMS' BILL OF RIGHTS

To guarantee that:

- Victims must be recognized and acknowledged as real people with real problems.
- Victims must be protected—by more police, security, safety legislation, and services.
- Victims must be supported—with medical, social, legal, and financial aid and realistic reimbursement, by the perpetrator and/or the government, of expenses and losses.
- Victims must be part of the judicial process—and must have meaningful opportunity to give their input into court proceedings.
- Potential Victims must have freedom from the fear and reality of becoming a Victim.

With this recognition and this commitment, past, present, and potential Victims may regain hope and achieve fulfillment of

this dream. Discussion and dialogues by professionals, Victims, and other interested parties can aid in realizing this goal.

Our twenty-six contributors have offered their suggestions, interpretations, and recommendations for addressing and preventing the wrongs perpetrated on Victims, not only by criminals but by our society, our governments, other nations' governments, and, most hurtful, by uncaring citizens (some of whom actually may have been Victims themselves).

Some of our contributors' suggestions may be impractical, some may be disapproved or opposed, and some may be highly controversial. But all contributors were motivated by their sincere interest in righting the wrongs perpetrated on Victims. Such ideas and discussions, even those of a controversial nature, should help raise new issues and result in new solutions to the problem. As the noted anthropologist Ashley Montagu observed in a different context, "We are each of us part of the problem. The question is whether we are going to remain part of the problem or make ourselves part of the solution" (1972, p. 1058). In this age of narcissistic concern for oneself above others, any expressed interest in and concern for others is refreshingly welcome.

We offer these varied thoughts, perspectives, and suggestions as our contribution to reaching the long sought-after goal of a future world without crime, without criminals, without injustice—and without Victims.

REFERENCES

- Cichowski, John. (1991). "N.J. Victims to Get More Say in Crime Cases." *The Record*, Hackensack, NJ, March 5, A3.
- Greenhouse, Linda. (1991). "High Court Widens Evidence Allowed in Capital Cases." *The New York Times*, June 28, pp. A1, A14–15.
- Ifill, Gwen. (1991). "Senate Approves Handgun Controls." *The New York Times*, June 29, pp. A1, A9.
- James, George. (1991). "New York Killings Set a Record, While Other Crimes Fell in 1990." *The New York Times*, April 23, pp. A1, B4.

- Montagu, Ashley. (1972). "Sociogenic Brain Damage." *American Anthropologist*, 74, pp. 1045-1061.
- The Record* (newspaper). (1991). "U.S. Leads World in Violent Crime." Hackensack, NJ, March 13, pp. A1, A10.
- Richards, Clay F. (1991). "Worrying about Money." *New York Newsday*, June 18, p. 5.
- Tierney, John. (1991). "As Crime Drops in Midtown, Even Criminals Credit Police." *The New York Times*, April 24, pp. A1, B4.

Help for Victims

Organizations and Resources

The following are a representative sample of more than half of the over 200 organizations and agencies that serve the entire United States. They have not been individually evaluated and are included here because they were reported to provide information and/or help for victims of crime or injustice. They are not recommended or endorsed by NOVA, the Plenum Publishing Corporation, or the editors of or the contributors to this book.

For organizations not listed here, in addition to the more than 6,000 other local groups, write to or call:

National Organization for Victim Assistance (NOVA)
1757 Park Road N.W.
Washington, DC 20010
(202) 232-6682

We would like to express our and all victims' appreciation to the National Organization for Victim Assistance (NOVA) for providing the following detailed listing of organizations and services that offer aid to victims of crime or injustice. In particular, Cheryl Guidry Tyiska, Victim Services Coordinator for NOVA, is to be congratulated for the time, energy, effort, and obvious concern she expended on compiling this most important resource list, and

Dr. Marlene Young, Director of NOVA, is to be thanked for permitting us to use this invaluable information in this book.

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| Genocide | State and Local Governments |
| Grass-Roots Organizations | Volunteerism |
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CHILDREN

American Association for Protecting Children
A Division of the American Humane Association
P.O. Box 1266
Denver, CO 80231
(303) 695-0811
(800) 227-5242

American Professional Society on the Abuse of Children
%University of Chicago
School of Social Science Administration
969 East 60th Street
Chicago, IL 60637
(312) 702-9419

American Association for Lost Children
P.O. Box 41154
Houston, TX 77241
(800) 873-LOST

Center on Children and the Law
American Bar Association
1800 M Street, N.W., Suite 200-S
Washington, DC 20036
(202) 331-2250

Council for Prevention of Child Abuse and Neglect
1305 Fourth Avenue, Room 202
Seattle, WA 98101
(206) 343-2590

Incest Survivors Resource Network, International
P.O. Box 911
Hicksville, NY 11802
(516) 935-3031

March of Dimes Birth Defects Foundation
1275 Mamaroneck Avenue
White Plains, NY 10605
(914) 428-7100

Missing Child Network
1408 Parkmoore, Suite 400
San Jose, CA 95126
(800) 235-3535

National Adolescent Sexual Abuse Prevention Project
124D Senatorial Drive
Wilmington, DE 19807
(302) 654-1102

National Center for the Prosecution of Child Abuse
American Prosecutors Research Institute
1033 North Fairfax Street, Suite 200
Alexandria, VA 22314
(703) 739-0321

National Child Abuse Coalition
733 Fifteenth Street, N.W., Suite 938
Washington, DC 20005
(202) 247-3666

National Child Abuse Hotline
Child Help USA
P.O. Box 630
Hollywood, CA 90028
(213) 465-4016
(800) 4A-CHILD

National Children's Advocacy Center
106 Lincoln Street
Huntsville, AL 35801
(205) 533-KIDS

National Council on Child Abuse and Family Violence
1155 Connecticut Avenue, N.W., Suite 300
Washington, DC 20036
(202) 429-6695

National Court Appointed Special Advocates Association
2722 Eastlake Avenue East, Suite 220
Seattle, WA 98105
(206) 328-8588

Parents United
P.O. Box 952
San Jose, CA 95108
(408) 280-5055

Runaway Hotline
P.O. Box 12428
Austin, TX 78711
(800) 231-6946

Victims of Child Abuse Laws (VOCAL)
P.O. Box 8536
Minneapolis, MN 55408
(612) 521-9714

CORRECTIONS, PROBATION, AND PAROLE

American Probation and Parole Association
Council of State Governments
Iron Works Pike
P.O. Box 11910
Lexington, KY 40578
(606) 231-1914

National Prison Project
1616 P Street, N.W., Suite 340
Washington, DC 20036
(202) 331-0500

The Sentencing Project
918 F Street, N.W., Suite 501
Washington, DC 20004
(202) 628-0871

CRIME PREVENTION

National Crime Prevention Council
1700 K Street, N.W., Second Floor
Washington, DC 20006
(202) 466-6272

CROSS-CULTURAL

Black, Indian, Hispanic, and Asian Women in Action
122 West Franklin Avenue, Suite 306
Minneapolis, MN 55404
(612) 870-1193

NAACP Legal Defense Fund
99 Hudson Street
Suite 160
New York, NY 10013
(800) 221-7822

National Council on Jewish Women
53 West 23 Street
New York, NY 10010
(212) 645-4048

National Indian Justice Center
The McNear Building
7 Fourth Street, Suite 28
Petaluma, CA 94952
(707) 762-8113

National Urban League
500 East 62 Street
New York, NY 10021
(800) 468-5435
(212) 310-9000

CULTURCIDE

Cultural Survival, Inc.
53-A Church Street
Cambridge, MA 02138
(617) 495-2562
See also GENOCIDE

DISPUTE RESOLUTION

Committee on Dispute Resolution
American Bar Association
1800 M Street, N.W., Suite 200
Washington, DC 20036
(202) 331-2258

U.S. Association for Victim–Offender Mediation
254 South Morgan Boulevard
Valparaiso, IN 46383
(219) 462-1127

ELDERLY

American Association of Retired Persons
Division of Criminal Justice
1909 K Street, N.W.
Washington, DC 20049
(202) 728-4363

National Aging Resource Center on Elder Abuse
810 First Street, N.E., Suite 500
Washington, DC 20002
(202) 682-2470

Clearinghouse on Abuse and Neglect of the Elderly
%College of Human Resources
University of Delaware
Newark, DE 19716
(302) 451-2940

FEDERAL GOVERNMENT

Federal Bureau of Investigation
U.S. Department of Justice
Tenth and Pennsylvania Avenue, N.W.
Washington, DC 20535
(202) 324-3000

Juvenile Justice Clearinghouse
1600 Research Boulevard
Rockville, MD 20850
(800) 638-8736

National Center on Child Abuse and Neglect
Administration for Children, Youth and Families, Children's
Bureau
Office of Human Development Public Affairs
U.S. Department of Health and Human Services
P.O. Box 1182
Washington, DC 20013
(202) 619-0257

National Institute of Corrections

320 First Street, N.W.
Washington, DC 20534
(202) 724-3106

National Institute of Mental Health

Parklawn Building
5600 Fishers Lane
Rockville, MD 20857
(301) 443-4515
(301) 443-3728, Antisocial and Violent Behavior Branch

Office for Victims of Crime

Office of Justice Programs
U.S. Department of Justice
633 Indiana Avenue, N.W., Thirteenth Floor
Washington, DC 20531
(202) 724-5947

FUND RAISING

National Society for Fundraising Executives

1101 King Street, Suite 3000
Alexandria, VA 22314
(703) 684-0410

GENERAL

National Organization for Victim Assistance (NOVA)

1757 Park Road, N.W.
Washington, DC 20010
(202) 232-6682

National Victim Center
307 West Seventh Street, Suite 1001
Fort Worth, TX 76102
(817) 877-3855

Victims for Victims
103-25 Sixty-Eighth Avenue
Queens, NY 10079
(212) 431-1200

White Collar Crime 101
8300 Boone Boulevard, Suite 500
Vienna, VA 22182
(703) 848-9248

GENOCIDE

Amnesty International
P.O. Box 37137
Washington, DC 20013
(800) 552-6637

Cultural Survival, Inc.
53-A Church Street
Cambridge, MA 02138
(617) 495-2562

International Society for the Prevention of Genocide
Paris, France

GRASS-ROOTS ORGANIZATIONS

The Compassionate Friends, Inc.

P.O. Box 1347

Oak Brook, IL 60521

(312) 990-0010, 10-2/M-F

Families and Friends of Missing Persons and Violent Crime
Victims

P.O. Box 27529

Seattle, WA 98125

(206) 362-1081

Handgun Control

1225 Eye Street, N.W.

Washington, DC 20005

(202) 898-0792

Mothers Against Drunk Driving

MADD National Headquarters

669 Airport Freeway, Suite 310

Hurst, TX 76053

(817) 268-MADD

Parents Anonymous

6733 South Sepulveda Boulevard, Suite 270

Los Angeles, CA 90045

(800) 421-0353 (national)

(800) 356-0386 (California)

Parents of Murdered Children and Other Survivors of Homicide

100 East 8 Street, Suite B-41

Cincinnati, OH 45202

(513) 721-5683

Students Against Driving Drunk
P.O. Box 800
Marlboro, MA 01752
(508) 481-3568

They Help Each Other Spiritually National Headquarters
410 Penn Hills Mall
Pittsburgh, PA 15235
(412) 471-7779

HATE-MOTIVATED VIOLENCE

Anti-Defamation League
B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

Anti-Violence Project
National Gay and Lesbian Task Force
1517 U Street, N.W.
Washington, DC 20009
(202) 332-6483

National Institute against Prejudice and Violence
525 West Redwood Street
Baltimore, MD 21201
(301) 328-5170

HOSTAGES AND TERRORISM

Amnesty International
P.O. Box 37137
Washington, DC 20013
(800) 552-6637

Institute for Victims of Trauma
6801 Market Square Drive
McLean, VA 22101
(703) 847-8456

International Society for the Prevention of Genocide
Paris, France

No Greater Love
1750 New York Avenue, N.W.
Washington, DC 20006
(202) 783-4665

JUDICIARY

Institute for Court Management of the National Center for State
Court
1331 Seventeenth Street, Suite 402
Denver, CO 80220
(303) 321-3963

National Council of Juvenile & Family Court Judges
P.O. Box 8970
Reno, NV 89507
(702) 784-6012

LAW ENFORCEMENT

Concerns of Police Survivors, Inc.
9423-A Marlboro Pike
Upper Marlboro, MD 20772
(301) 599-0445

International Association of Chiefs of Police
1110 North Glebe Road, Suite 200
Arlington, VA 22201
(703) 243-6500

National Organization of Black Law Enforcement Executives
908 Pennsylvania Avenue, S.E.
Washington, DC 20003-2227
(202) 546-8811

MANAGEMENT

American Management Association
135 West 50 Street
New York, NY 10020
(212) 586-8100

American Society of Association Executives
1575 I Street, N.W.
Washington, DC 20005
(202) 626-2723

MEDICAL RESOURCES

American Nurses' Association, Inc. (ANA)
2420 Pershing Road
Kansas City, MO 64108
(816) 474-5720

Ask A Nurse Connection
Drug and Alcohol Treatment Referrals
(800) 535-1111

Citizen Action

1300 Connecticut Avenue, N.W., Suite 401
Washington, DC 20036
(202) 857-5153

Deaf Pride, Inc.

1350 Potomac Avenue, S.E.
Washington, DC 20003
(202) 675-6700

EMERGE (Batterers Services)

280 Green Street, Second Floor
Cambridge, MA 02139
(617) 547-9870

Hemophilia and AIDS Network for the Dissemination of
Information (HANDI)

%National Hemophilia Foundation
110 Greene Street, Suite 406
New York, NY 10012
(212) 219-8180

National Abortion Federation

900 Pennsylvania Avenue, S.E.
Washington, DC 20003
(202) 667-5881

National Abortion Rights Action League

1101 Fourteenth Street, N.W.
Washington, DC 20005
(202) 371-0779

National HIV and AIDS Hotline and Information Service
P.O. Box 13827
Research Triangle Park
North Carolina 27709
(800) 342-AIDS (English)
(800) 344-SIDA (Spanish)
(800) 243-7889 (Hearing Impaired)

National AIDS Information Clearinghouse
P.O. Box 6003
Rockville, MD 20850
(800) 458-5231
(301) 762-5111 (Reference assistance)
(800) 458-5231 (Publications, bulk order)

National Alliance for the Mentally Ill
1901 North Fort Meyer Drive, Suite 500
Arlington, VA 22209
(703) 524-7600

MISSING PERSONS (ADULT)

Nationwide Missing Persons Bureau
P.O. Box 60604
Houston, TX 77205
(713) 449-0355
(713) 449-3447

Network for the Missing Mentally Ill
P.O. Box 444
Hanson, MA 02341
(617) 447-5258

PROSECUTION AND BAR

American Bar Association
Victims Committee
Section on Criminal Justice
1800 M Street, N.W., Second Floor South
Washington, DC 20036
(202) 331-2260

American Civil Liberties Union
132 West 43 Street
New York, NY 10036
(212) 944-9800

American Indian Law Center
P.O. Box 4456, Station A
Albuquerque, NM 87196
(505) 277-5462

The Association of Trial Lawyers of America
1050 Thirty-First Street, N.W.
Washington, DC 20007
(202) 965-3500

Center for Civil Rights
Landmark Legal Foundation
1006 Grand Avenue, Fifteenth Floor
Kansas City, MO 64106
(816) 474-6600

or

216 G Street, N.E.
Washington, DC 20002
(202) 546-6045

Center for Constitutional Rights (CCR)

666 Broadway
New York, NY 10012
(212) 614-6464

National College of District Attorneys

University of Houston Law Center
University Park
Houston, TX 77004
(713) 749-1571

National Institute for Citizen Education in the Law

24 E Street, N.W., Suite 400
Washington, DC 20001
(202) 662-9620

Trial Lawyers for Public Justice

1625 Massachusetts Avenue, N.W., Suite 100
Washington, DC 20036
(202) 797-8600

PSYCHOLOGY AND MENTAL HEALTH**American Association for Counseling and Development**

5999 Stevenson Avenue
Alexandria, VA 22304
(703) 823-9800

National Association of Social Workers

7981 Eastern Avenue
Silver Spring, MD 20910
(301) 565-0333

National Mental Health Association
1021 Prince Street
Alexandria, VA 22314
(703) 684-7722

The Society for Traumatic Stress Studies
P.O. Box 1564
Lancaster, PA 17603
(717) 396-8877

PUBLICATIONS AND RESEARCH

American Institutes for Research
3333 K Street, N.W.
Washington, DC 20007
(202) 342-5000

Media Network Information Center
121 Fulton Street
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Washington, DC 20525
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Volunteer-The National Center
The National Center for Citizen Involvement
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Arlington, VA 20005
(703) 276-0542

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Center for the Prevention of Sexual and Domestic Violence
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Seattle, WA 98103
(800) 562-6025
(206) 634-1903

Center for Women Policy Studies (CWPS)
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Washington, DC 20036
(202) 872-1770

Clearinghouse on Family Violence Information
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Washington, DC 20013
(703) 821-2086

Congressional Caucus on Women's Issues
2471 Rayburn House Office Building
Washington, DC 20515
(202) 225-6740

Family Violence Program
%Canadian Council on Social Development
55 Parkdale Avenue
P.O. Box 3505, Station C
Ottawa, Ontario K1Y 4G1
(613) 728-1865

Men Stopping Rape
Box 316
306 North Brooks Street
Madison, WI 53703
(608) 257-4444

Military Family Resource Center (MFRC)
4015 Wilson Boulevard
Arlington, VA 22203
(800) 336-4592

National Center for Women and Family Law
799 Broadway, Room 402
New York, NY 10003
(212) 674-8200

National Clearinghouse on Marital and Date Rape
(415) 524-1582

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National Network for Victims against Sexual Assault
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National Organization for Changing Men
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Columbus, OH 43207
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National Organization for Changing Men (NOCM)
10 Oakland Avenue
Auburn, MA 02166
(617) 964-2816

National Organization for Women (NOW)
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Washington, DC 20036
(202) 331-0066

Task Force on Families in Crisis
4004 Hillsborough Road, Suite 2233
Nashville, TN 37215
(615) 383-4480

Women against Abuse

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Philadelphia, PA 19101

(215) 386-1280

(215) 686-7082 (Legal Center)

(215) 386-6312 (Administrative Offices)

Women's Legal Defense Fund, Inc.

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Washington, DC 20036

(202) 887-0364

Young Women's Christian Association of the U.S.A. (YWCA)

726 Broadway

New York, NY 10003

(212) 614-2700

or

624 9th Street, N.W.

Washington, DC 20001

(202) 628-3636

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